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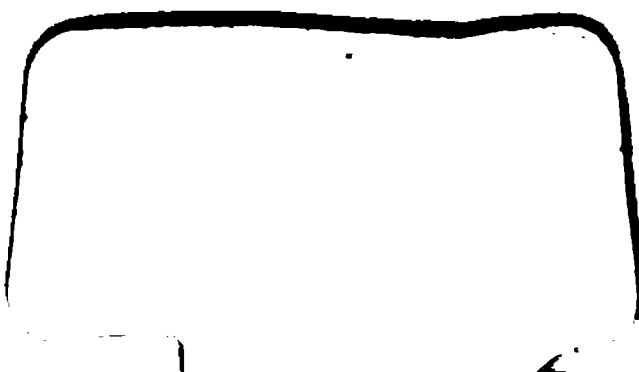
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

**WITH TABLES OF CASES REPORTED AND CITED, AND STAT-
UTES CITED AND CONSTRUED, AND AN INDEX.**

CHARLES F. REMY,
OFFICIAL REPORTER.

JOHN W. DONAKER, Assistant Reporter.

VOL. 31.

**CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1902, AND NOT
REPORTED IN VOLUME 30, AND CASES DECIDED AT
THE MAY AND NOVEMBER TERMS, 1903.**

INDIANAPOLIS:
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JUDGES
OF THE
APPELLATE COURT

OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. FRANK S. ROBY.*
HON. WOODFIN D. ROBINSON.†
HON. WILLIAM J. HENLEY.‡
HON. JAMES B. BLACK.
HON. DANIEL W. COMSTOCK.
HON. ULRIC Z. WILEY.

* Chief Judge at November Term, 1902.

† Chief Judge at May Term, 1903.

‡ Chief Judge at November Term, 1903.

Term of office of each Judge began January 1, 1903.

(xxx)

OFFICERS
OF THE
APPELLATE COURT.

ATTORNEY-GENERAL,
CHARLES W. MILLER.

REPORTER,
CHARLES F. REMY.

CLERK,
ROBERT A. BROWN.

SHERIFF,
GEORGE W. WEIR.

LIBRARIAN,
HOYT N. McCLAIN.

CASES
ARGUED AND DETERMINED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

**AT INDIANAPOLIS, NOVEMBER TERM, 1902, AND MAY AND
NOVEMBER TERMS, 1903, IN THE EIGHTY-
SEVENTH YEAR OF THE STATE.**

**CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. KEPLER.**

[No. 3,953. Filed April 7, 1903.]

TRESPASS.—*Title.*—*Special Finding.*—*Appeal.*—A judgment against a railroad company for damages for wrongfully entering upon plaintiff's land and removing a fence will not be reversed on the question of ownership of the land, where the special findings upon which the conclusions of law were based showed the record title of the land to be in plaintiff, and no facts were stated showing title by adverse possession in defendant, there being evidence to sustain the findings.

From Wayne Circuit Court; *J. F. Robbins*, Special Judge.

Action by John H. Kepler against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

J. T. Dye and *J. L. Rupe*, for appellant.

L. E. Kepler, for appellee.

HENLEY, J.—This case was transferred to this court by the Supreme Court. Appellee commenced this action by

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complaint in two paragraphs, asking damages of appellant on account of an alleged trespass by appellant in entering upon appellee's real estate and taking down and removing a fence. The question in this case is as to who is the owner of the land upon which the fence was built.

The judge trying the cause, at the request of appellant, found the facts specially, and stated conclusions of law thereon. Appellant excepted to the conclusions of law, thereby admitting, for the purpose of testing the correctness of the conclusions of law, that the facts found were correct.

Upon the subject of the ownership of the land where the fence was built the court found as follows: "That at all times since the construction of said railroad, and during the time it has since continuously operated the same on the east bank of said canal, it has continuously held and used and possessed the ground covered by its tracks and a strip of ground from six to ten feet in width extending from the west of the west rail of her said track, and running parallel therewith through the land described in the plaintiff's deed, but the right of way line between its said tracks and the water of said canal has not been defined by any fence or enclosure or particular marks defining the same; that the strip of ground so occupied by the defendant and its predecessors in the ownership of said railroad for its tracks and right of way, is included within the boundaries of the land as described in the deed to the plaintiff from Peter Kepler and wife, above referred to; that the said railroad, as laid and constructed along the east line of plaintiff's land, was so laid that the west end of the railroad ties of its main track was substantially upon the top of the east bank of the canal, and from the time of the construction of said road continuously to a date about seven years ago the water in said canal has always flowed over the bed of the same, and along the east side thereof, next to the track of said railroad, had flowed so that it was within four or five feet of the west end of the said railroad ties; that

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about seven years ago David Creitz, the owner of the said Conklin mill, for the purpose of improving the water-power of said mill, dredged out the canal, deepening the channel for the flow of water therein and along the east side of the plaintiff's land. Such dredging had had the effect to extend the water-line, at the ordinary stages of water in said canal, westward from where it had theretofore flowed, and that since the said dredging out the water-line in the said canal, at the ordinary stages of water therein, has been and remained at varying distances from the said defendant's railroad track of from sixteen to twenty-four feet west therefrom; that the said increased space between the water of said canal and said track over which the water of the canal has not been accustomed to flow during the said period of seven years, however, is ground which was in the bed of the said canal as originally constructed, and since said period the said ground between the railroad track and the water-line in the canal has been and remained a gradual sloping bank, sloping downward from a point substantially at the west end of the ties of the railroad to the water-line of the canal. The said change in the flow of the water in said canal, so made about seven years ago, was made wholly by said David Creitz, the owner of said mill, without objection from the landowner, and for his own use and purposes; that the plaintiff has never at any time since the construction of said railroad made any use of the ground lying between said railroad track and the water-line of the canal; that the said railroad company, the defendant herein, never had possession of or made any use of this new bank of said canal so made by dredging, nor any part of the abandoned canal, except the portion of the east bank so occupied by her said railroad tracks, and a strip of ground six to ten feet in width adjoining the west rail of said track on the west and running parallel with said track, excepting, however, that during the past year said company has mowed the weeds and grass growing on

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the entire strip of ground lying between the west rail of her track and the edge of the water of the canal; that at the time of the construction of the said railroad of the defendant along the plaintiff's land the said land, now owned by the plaintiff, was owned and in the possession of one David Keller, who resides upon said land, and saw and knew at the time that said road was constructed that the same was so being constructed along the east side of his land, and with his knowledge and assent. The court further finds that on August 7, 1897, the plaintiff served a written notice on the freight agent of the defendant at Cambridge City, Indiana, he being the nearest freight-receiving and shipping agent of the defendant company to the plaintiff's land. By the notice the plaintiff described his land, and requested the defendant to build a fence between their lands, without defining any line upon which said fence should be located; that the plaintiff's said land was then enclosed on three sides west of said canal, and was a farm used and cultivated by him as farm land; that at one time there was no fence on the east side of plaintiff's land, either on the east side or the west side of the canal; that the defendant offered and proposed to construct a fence for the plaintiff on the west side of the canal, claiming that the land on the east side between its track and the water-line was its right of way; that the said railroad had been completed and operated by the defendant for more than four years last past, and by the terms of the said notice, so served by the plaintiff, the defendant was notified that after thirty days, if it failed to construct a lawful fence on the east bank of the canal, that the plaintiff intended to enter upon the land and right of way of the railroad and construct a fence, and collect the costs thereof from the defendant; that on the — day of October, 1897, the plaintiff began setting posts for the construction of a fence east of the canal and between the railroad track and the water's edge, at a point fifteen feet distant west from the west rail

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of the defendant's road and parallel with the railroad; that all the posts so planted by the plaintiff were planted on a line west of and parallel with and fifteen feet distant from the west rail of defendant's said track. The plaintiff planted posts costing him \$10, and furnished labor in planting the same costing him \$5, and the defendant's agents tore out and removed on the same date the posts so set, under instruction from the defendant company, by which the plaintiff sustained damage in the sum of \$1; that on the line where said posts were being set as above described, the plaintiff was the owner in fee of the ground, and the same is included within the boundaries of his said deed from Peter Kepler and wife, and up to the period of seven years prior to this time, when the said canal was dredged by David Creitz, as hereinbefore found, this line, upon which the posts were, so being set, was covered with water, and had been since 1867 and since the construction of the canal, and was within the bed of the canal and the water channel thereof until after said canal was dredged as aforesaid."

The finding also includes facts showing a perfect record title in appellee to the land upon which the fence was built, through various deeds and proceedings in court, and there are no facts found which are so at variance with the facts, which place the title in appellee, as to render the finding invalid and of no effect upon this point. We must, therefore, hold the conclusion of law that appellee is and has been for more than five years last past the owner in fee simple of the land upon which the fence was built, a correct conclusion from the facts stated.

The only question then remaining is, was there evidence to support the finding of facts upon which the trial court based its conclusions of law? The evidence shows an unbroken record title in appellee to the land in dispute. It is not shown how appellant acquired title, except by adverse possession for more than twenty years, and the court had the right to conclude from the evidence that such adverse pos-

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session did not extend to the line where appellee attempted to build the fence. The disputed questions of facts were all sustained by some evidence.

The judgment of the trial court is affirmed.

SYFERS ET AL. v. KEISER.

[No. 4,313. Filed April 8, 1903.]

JUDGMENT.—*Mistake.—Setting Aside.*—No error was committed in setting aside a judgment, under §399 Burns 1901 authorizing the court in its discretion to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, where it appeared that defendant, in an action on a promissory note, left his home on business before the case was set for trial, and left with his family and counsel instructions where he could be reached by mail or telephone, and his counsel wrote him, but he failed to receive the letter, and his daughter telephoned him, and some person representing himself to be defendant answered saying he would be home for the trial, and judgment was taken without defendant's knowledge that the case was set for trial.

From Tipton Circuit Court; *W. W. Mount*, Judge.

Action by Rufus K. Syfers and others against Samuel A. Keiser. From a judgment for defendant, plaintiffs appeal. *Affirmed.*

C. O. Roemler, L. A. Whitcomb and W. R. Oglebay, for appellants.

I. W. Christian, W. S. Christian and E. E. Cloe, for appellee.

ROBINSON, J.—Suit by appellants on a note. Appellants had judgment, which was afterwards set aside, and upon a trial judgment was rendered for appellee. The first judgment was set aside under that provision of the statute authorizing the court, in its discretion, to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. §399 Burns 1901. Of this action of the court complaint is here made; also the denial of a new trial.

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The cause was put at issue by the filing of an answer, and a reply, and was set for trial, but was continued by agreement until a later day in the term. On December 3, at the same term, the record recites, "Come the parties by counsel," and the case was submitted to the court for trial, resulting in a finding and judgment for appellants. December 11, at the same term, appellee filed a motion to set aside this judgment, which was sustained. In appellee's affidavit filed in support of his motion to set aside the judgment he recites the fact of the judgment of December 3; that two weeks prior to that time he was a resident of Noblesville, and left his home on business duties until after the rendition of the judgment; that when he left home the case had not been set for trial December 3, or, that if it had been, he had no knowledge thereof; that, in order to be present at the trial, should the same be set during his absence, he left with his counsel and his family instructions where he could be reached by telephone or mail, and that the week prior to December 3 he spent almost the entire week in Marion, and that his family believing that he was in Marion on Saturday night before the trial, his daughter, in ample time to permit him to attend, called him over the telephone, and some one answered, informing her that it was affiant, whereupon the daughter told him the trial was set for the following Monday, but in fact he was not called by the person operating the telephone, nor was he informed that there was any telephone communication for him; that at the time the call was made for him he was at a hotel in Marion; that he made diligent search to find the person who received the call at the telephone office, but was unsuccessful, and that no record of the call was kept; that he had no notice of the date fixed for the trial until after the judgment was taken; that he had a good defense to the cause, and was not indebted to appellants in any sum whatever.

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Afterwards, appellee filed the affidavit of his daughter, Bertha Keiser, that on December 1, she called the central telephone office, and asked the operator for Samuel Keiser at Marion; that a man representing himself to be Samuel Keiser answered; that she told him the case was set for trial at Tipton on Monday, December 3, to which he answered he would be there; that she asked him to come home, and he answered that he would come right away; that she afterwards took down the phone again, and asked the operator, Miss Patterson, to call Mr. Samuel Keiser again; that she asked if that was Mr. Samuel Keiser of Noblesville, and he answered, "Yes;" that she repeated the statement that his attorneys said his case would come up for trial at Tipton on Monday, December 3, and he answered again that he would be there. Also the affidavit of the night operator at Noblesville, stating that on that night—December 1—Bertha Keiser called her father at Marion, and was answered by a man representing himself to be Samuel A. Keiser of Noblesville. Also the affidavit of appellee's wife, Jennie Keiser, stating that about November 26, 1900, Ira W. Christian, appellee's attorney, asked her when her husband would be at home; that she told the attorney she expected him home December 1; that the attorney stated that the case was set for trial December 3, and asked her where he could reach appellee by letter; that she advised him to write to Elwood; that afterwards, on Thanksgiving day, the attorney's letter came back unclaimed, and on that day she handed the letter to the attorney, and told him her husband would surely be home Saturday; that when he did not come on the train at 10 o'clock that evening she and her daughter went to the telephone, as stated in the daughter's affidavit. Also the affidavit of Ira W. Christian, attorney for appellee, that upon being informed the case was set for trial December 3, he went to the home of appellee, a traveling salesman, and was informed by appellee's wife that appellee had gone to Elwood, and would be there a few

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days; that he immediately wrote a letter, stating the case was set for trial December 3; that afterwards, November 29, appellee's wife returned to him the letter, marked by the postmaster at Elwood "Unclaimed."

Counter affidavits were filed by appellants and their attorneys, stating, among other things, that appellee's attorneys were present in court when the cause was called for trial December 3, in the forenoon of that day, and at the request of appellee's attorneys the cause was not submitted to the court for trial until the afternoon session.

Appellee did not, strictly speaking, suffer a default. The statute does not use the term default. It gives a party relief from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, whether the judgment is taken against him by default, as that term is usually understood, or not. He had pleaded his defense to the complaint. If the facts pleaded in his answer were true, there was no liability on the note. He was guilty of no neglect except as to attending the trial. We can not say there was any abuse of discretion on the part of the trial court in concluding that upon the showing made by the affidavits, his neglect was excusable. It is and has always been the policy of the law to dispose of cases on their merits, and a statute of this character, being remedial, should be liberally construed. The affidavits show that it was his intention to attend the trial; that he was necessarily away from home; that he endeavored to keep his whereabouts known so that he could be communicated with; that through the mistake or fraud of some one he failed to receive the communication by telephone, and that his attorneys endeavored to inform him of the time of the trial by letter. He also sufficiently shows that he has a defense to the action. Each case of this character must be determined upon its own particular facts, and the conclusion of the trial court will not be disturbed where it is supported by some evidence. *Williams v. Grooms*, 122

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Ind. 391; *Green v. Stobo*, 118 Ind. 332; *Beatty v. O'Connor*, 106 Ind. 81; *Masten v. Indiana Car, etc., Co.*, 25 Ind. App. 175, and cases cited.

Upon the material questions in the case the evidence is directly conflicting. We can not weigh it to determine the preponderance. There is evidence to support the verdict.

Judgment affirmed.

**RICH, ADMINISTRATOR, v. EVANSVILLE AND TERRE
HAUTE RAILROAD COMPANY.**

[No. 4,607. Filed April 8, 1903.]

RAILROADS.—Crossing.—Duty of Traveler to Look and Listen.—Misleading Acts on Part of Railroad Company.—The failure of a railroad company to sound the whistle and ring the bell and to run the train on the siding, as had been its custom to do with such train, did not relieve a traveler approaching the crossing of the duty of looking and listening for the approach of trains before attempting to cross the track. *pp. 10-14.*

NEGLIGENCE.—Personal Injuries.—Complaint.—Contributory Negligence.—Though plaintiff in an action for personal injuries is not required to allege in his complaint nor to prove the want of contributory negligence, nevertheless if the statement of facts in the complaint shows plaintiff guilty of contributory negligence the complaint is insufficient. *pp. 14, 15.*

From Sullivan Circuit Court; *O. B. Harris*, Judge.

Action by George A. Rich, administrator of the estate of Joseph H. Rich, deceased, against the Evansville & Terre Haute Railroad Company. From a judgment for defendant on demurrer to complaint, plaintiff appeals. *Affirmed.*

C. D. Hunt, for appellant.

J. E. Iglehart, *Edwin Taylor*, *J. T. Hays* and *W. H. Hays*, for appellee.

COMSTOCK, J.—Action by appellant to recover damages for the killing of decedent Joseph H. Rich at a public highway crossing May 3, 1901. At the point in question

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the highway crossed the railroad track at right angles, about two miles north of the station at Sullivan.

The complaint charges: That on the east side of appellee's railroad track, 560 feet from said highway, there was a switch, the north end of which was 130 feet south of the crossing; that on the day of the accident two passenger trains were scheduled to arrive and depart from said station—one, north-bound train No. 2, at 3:17 p. m., and the other, south-bound train No. 1, at 3:29 p. m.; that on said date, and long prior thereto, it had been the custom of said train No. 2 to take the siding to permit train No. 1 to pass, which fact was known to decedent. This was not done on the day of the accident. On the contrary, train No. 2 left said station on time, but, without stopping at the siding, it was run by the same and over the crossing at sixty miles per hour, without giving any warning signals of its approach. Decedent was driving a team of horses with wagon, in a slow walk from west to east, and while so doing the wagon was struck on the crossing by the locomotive, decedent was thrown out and immediately killed. It is charged that the view of the railroad track, to the south and on the west side as one approaches the track from the west, was partially obstructed by bushes, undergrowth, a barn, and a house. It is also stated that decedent was familiar with the crossing, and the use of the siding for the purpose stated; that by reason of the premises, and the failure to give any warning of the approach of the train to the crossing, decedent was misled, and led to believe that there was no danger in going over the crossing, by reason of which he was prevented from taking the precautions he would otherwise have done. The essential averments of the complaint, omitting recitals summarized above, are as follows: "That the defendant, by its servants, who were then operating said locomotive train, as aforesaid, unlawfully, carelessly, and negligently failed and omitted to give any warning or signal of the approach of said locomotive and cars

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toward said second crossing by the sounding of a whistle or the ringing of a bell or in any manner; that said company purposely failed to run said locomotive engine and cars on said siding provided for said purpose, as said train was so scheduled to take said siding, and as it had been the habit and custom of the defendant's agents and servants running said train so to do, but, on the contrary, unlawfully, negligently, and recklessly ran said train at sixty miles per hour up to and over said second and north crossing without sounding the whistle or ringing the bell of said locomotive, or in any manner giving any warning whatever of the approach of said train to said crossing, and without stopping or slackening the speed for said switch and siding, and without running said train onto said siding; that * * * plaintiff's decedent * * * while he was thus driving along said highway and over said crossing, and was attempting to drive and pass over said crossing, the said wagon was run against and over by said locomotive * * * and said decedent was, by reason thereof, thrown out of said wagon, * * * and then and there instantly killed, solely by and through the negligence of the defendant running its said train over said public highway as aforesaid; * * * that by reason of the unlawful and negligent failure of defendant's servants and employes * * * to sound the whistle or ring the bell or to give any warning whatever * * * said decedent was misled and thrown off his guard, and * * * led to believe that said servants would run said train on said siding; * * * that by reason of the unlawful and negligent conduct of said company, as aforesaid, said decedent was thus prevented from taking the precaution which he would otherwise have observed, and by reason of the facts and circumstances under which said train No. 2 was run towards and over said crossing by said company, as aforesaid, created in the mind of the said decedent a sense of security and a belief that there was no danger, and that said servants and employes intended to and

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would run said train on said siding at said time for the aforesaid purpose of permitting passenger train No. 1 to pass said depot." No reference is made to train No. 1, or its non-approach to the crossing, or of the relation it bore thereto at the particular moment in question. The demurrer of appellee to this complaint was sustained, appellant declined to plead further, and, over his objection, judgment was rendered for appellee, from which this appeal is prosecuted.

The ruling of the court in sustaining the demurrer to the complaint is assigned, in this court, as error.

The theory of the complaint—to quote from appellant's brief—is "that the conduct of appellee in failing to sound the whistle and ring the bell on approaching the second north crossing, and failing to run train No. 2 in on the siding, as has been the custom of appellee so to do, misled, deceived, and threw decedent off his guard, and prevented him from taking the necessary precaution which he would otherwise have taken." It is not claimed that either the omission of the railroad company to take the siding or its failure to give the proper signals for the crossing would be sufficient alone to cause an ordinarily prudent man to be misled, but that "the combination of the two circumstances presents an entirely different case." The railroad track is itself a warning of danger. The duty of the traveler to exercise ordinary care exists in all cases, and what is ordinary care in one case may not be ordinary care in another. Elliott, Railroads, §1165, and cases cited.

Knowledge that a train is due imposes upon the traveler a somewhat higher exercise of care than if he was not in possession of such knowledge. Decedent had knowledge that a train was due. The traveler has no right to confine his precautions to trains scheduled to pass at a designated time; he must take precautions against "extra trains" and "wild trains" as well as regular trains. He must act upon the assumption that trains may pass at any time. He must

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look and listen for all trains. He has no right to proceed upon the assumption that trains will cross only at specified times. The decedent, if he used any precaution, confined it to trains scheduled to pass at a designated time. This was not enough. Elliott, Railroads, §1166.

The omission of the appellant to side-track the train in question was not negligence. This is, in effect, conceded by appellant. It is the theory of the complaint that this omission and the failure to ring the bell or blow the whistle caused the accident; but, while the failure to give warning of its approach was negligence, such negligence did not excuse decedent from looking and listening. *Miller v. Terre Haute, etc., R. Co.*, 144 Ind. 323; *Chicago, etc., R. Co. v. Thomas*, 147 Ind. 35; *Baltimore, etc., R. Co. v. Conoyer*, 149 Ind. 524; *Louisville, etc., R. Co. v. Williams*, 20 Ind. App. 576; *Chicago, etc., R. Co. v. Thomas*, 155 Ind. 634; *Oleson v. Lake Shore, etc., R. Co.*, 143 Ind. 405, 32 L. R. A. 149; Beach, Contrib. Neg. (3d ed.), §64; *Cleveland, etc., R. Co. v. Heine*, 28 Ind. App. 163.

Under the act of 1899 (Acts 1899, p. 58) the plaintiff is not required to allege in his complaint nor to prove the want of contributory negligence on the part of the traveler, but, if the statement of facts in the complaint show decedent guilty of negligence, the complaint will be insufficient. *Malott v. Hawkins*, 159 Ind. 127. In *Southern Ind. R. Co. v. Peyton*, 157 Ind. 690, cited by appellant, it was held that an averment that the deceased was free from contributory negligence was, under the act of 1899, immaterial. The averment of the complaint under consideration presents a different question. Said act does not abate the legal requirements as to the care that a traveler crossing a railroad track must use, and it does not change the rule that the traveler saw and heard or was heedless of that which, as an ordinarily prudent person, he ought to have taken notice of. *Malott v. Hawkins, supra*.

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The only act of negligence charged against appellant was the failure to give warning of the approach of the train. If the traveler, as has been held, must take precautions against all trains, decedent had no right to be misled by an act of negligence against which he took no precaution, and against which it was his duty to guard. He could not excuse himself from the exercise of ordinary care by assuming that he could cross in safety. No act of the railroad company, unless it prevents the traveler from losing his senses to discover danger, or lures him into fancied security, will excuse his neglect to look out for himself. The absence of signals is not an assurance of safety. It has been held in numerous cases that the traveler must still be on his guard. It has been held that the absence of a flagman at a railroad crossing, where one is usually stationed, is not to be taken by a traveler as assurance that no train is approaching. *McGrath v. New York, etc., R. Co.*, 59 N. Y. 468, 17 Am. Rep. 359.

The nonuse of accident gates at street crossings is not tantamount to an invitation to cross. *Chicago, etc., R. Co. v. Durand*, 65 Kan. 380, 69 Pac. 356, 12 Am. Neg. Rep. 29.

The conduct of a railroad company to relieve an injured party from the exercise of ordinary care must be of an affirmative character. The mere omission of a duty to give warning on the approach of a train is not such an act. The presence of the railroad track itself, being a warning of danger, admonishes a traveler that he must use caution.

It appears from the complaint that decedent, because of the alleged negligent misleading facts, was prevented from taking precautions he would otherwise have taken. What he would have done can only be a matter of conjecture, but it appears from the complaint that he took no precautions for his own safety. Neither does the complaint allege that if the signals had been given decedent could have heard them and avoided the collision.

Other objections are urged to the complaint. For the reasons given, it was insufficient, and it is unnecessary to consider them.

Judgment affirmed.

WORL v. REPUBLIC IRON & STEEL COMPANY.

[No. 4,328. Filed April 9, 1903.]

PLEADING.—Amendment.—Where, upon the sustaining of a demurrer to a complaint consisting of a single paragraph, the plaintiff filed “an amended second paragraph of complaint by leave of court first had and obtained,” the complaint filed under such leave will be regarded as an amended complaint, and, being so considered, it must be regarded as an amendment of the complaint originally filed, hence the original no longer constitutes a proper part of the record on appeal, and the error, if any, in sustaining the demurrer, must be treated as waived.

From Delaware Circuit Court; *J. G. Leffler*, Judge.

Action by Thomas Worl against the Republic Iron & Steel Company. From a judgment, for defendant, plaintiff appeals. *Affirmed.*

J. N. Templer, C. C. Ball and E. R. Templer, for appellant.

Frank Ellis, S. N. Chambers, S. O. Pickens, C. W. Moores, J. C. Blacklidge, C. C. Shirley and Conrad Wolf, for appellee.

BLACK, P. J.—The appellant’s original complaint consisted of a single paragraph. The appellee answered in a number of paragraphs, to some of which the appellant demurred. In ruling upon the demurrer the court carried it back and sustained it to the complaint. To this ruling the appellant at the time excepted, and day was given. It next appears in the record that about one month afterward the court sustained a motion of the appellant, then made, to file “an amended second paragraph of complaint,” and thereupon the appellant filed a pleading in a single

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paragraph, which therein purported to be "his amended second paragraph of complaint" filed by him "by leave of court first had and obtained." The trial of an issue formed by an answer in denial of this complaint resulted in a verdict for the appellee, on which judgment was rendered accordingly.

The only supposed error presented by the appellant in argument here is that of carrying the demurrer back and sustaining it to the complaint.

At the time leave was granted and the pleading was filed thereunder, there was not, and there had not been, any second paragraph of the complaint, and therefore the "second paragraph of complaint" could not be amended. There was a complaint in one paragraph, a demurrer to which had been sustained, and this was the only complaint that could be amended, and the only complaint for the amendment of which the court could grant leave, and the leave granted must be regarded as having been intended by the court as leave to amend the original complaint. This complaint filed under such leave, purporting to be an amended complaint, must be taken and regarded by us as an amended complaint, and, being so considered, it must be regarded as an amendment of the complaint originally filed. When a demurrer to a complaint has been sustained, and afterward an amended complaint is filed, the original no longer constitutes a proper part of the record on appeal, and the error, if any, in sustaining the demurrer must be treated as waived. §§345, 662 Burns 1901; *State, ex rel., v. Jackson*, 142 Ind. 259; *Hedrick v. Whitehorn*, 145 Ind. 642.

Judgment affirmed.

SMALL v. FINCH.

[No. 4,814. Filed April 10, 1908.]

EXECUTION.—Institution of Action for Possession of Property.—Dismissal.
—Notice.—Replevin.—An answer in a suit in replevin to recover possession of certain personal property in the hands of an officer under execution, alleging that plaintiff brought suit for the possession of the property so seized on execution, but dismissed the same, is not bad for failure to allege that notice was served upon the execution defendant upon the seizure of the goods as required by §1618 Burns 1901, since the suit to try the right of property dispensed with the statutory notice, and her failure to prosecute the same to final judgment with reasonable diligence constitutes a bar to any action against the officer or the purchaser of such property on account of the same.

From St Joseph Circuit Court; *W. A. Funk*, Judge.

Action by Mary E. Small against Walter Finch. From a judgment for defendant, plaintiff appeals. *Affirmed.*

E. A. Howard, for appellant.

A. N. Graham and *C. N. Crabill*, for appellee.

ROBINSON, J.—Appellant brought suit in replevin against appellee Finch, a constable, and one Henry Martling to recover possession of certain personal property. Martling filed an answer, designated a “plea in abatement,” disclaiming any interest in the property, that it had never been in his possession or under his control, that he did not assume control of the writ or direct its execution, that the property was seized by the officer by virtue of the writ alone; and the action as to him, was, in effect, dismissed. Finch answered that on April 25, 1901, he was, and still is, a constable; that on that day a justice of the peace delivered to him a writ of restitution, commanding him to put Martling in possession of certain premises, and to remove therefrom one W. H. Small, and to make of the goods of Small a named sum, for which Martling had judgment; that by virtue of the writ he levied on and seized

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as the goods of Small certain described personal property, and made due return thereof; that on June 28, 1901, the day on which the property was seized under the writ, appellant, the wife of W. H. Small, filed her verified complaint before the justice who issued the writ of restitution, making Martling and Finch defendants, and averring that on June 28, 1901, by virtue of an execution issued before that time by such justice to Finch as constable, in favor of Martling and against the property of W. H. Small, the constable levied upon and seized certain described personal property (the same property described in the complaint in this action). She further averred that at the time this property was her individual property. The answer further alleges that Martling and Finch were duly summoned, and appeared to defend the action on the day it was set for trial, but that the justice, upon the affidavit of Martling, having required the plaintiff, a nonresident, to give bond for costs, she thereupon dismissed her action. The answer further alleges that that complaint was sufficient to try the right of property under the statute; that the property described therein is the same property described in the complaint in this action; that she did not prosecute such suit, but dismissed the same without any fault of this appellee. Overruling a demurrer to this answer is the only question argued.

The only argument against this paragraph of answer is that it does not appear that the appellee ever served appellant with the notice required by §1613 Burns 1901, and the case of *Patterson v. Snow*, 24 Ind. App. 572, is cited. Upon this point that case simply holds that the fact that the party had actual notice of the seizure did not dispense with the required statutory notice, and the rights of the party claiming the property could not be barred, under the statute, unless he failed to respond to the statutory notice. In the case at bar, appellant not only knew of the seizure, but had instituted proceedings against the officer to try the right of

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property under the statute. On the day the property was seized, and under the provisions of the statute, she instituted proceedings asserting her claim to the property. She did have actual notice of the seizure, and while she could not be required to act upon such notice, yet she might do so, and she did do so, and asserted her claim to the property under the statute. She voluntarily did all she would have been required to do had the statutory notice been given, and, having instituted the proceedings, the statute (§1614 Burns 1901) provides that her failure to prosecute the same to final judgment with reasonable diligence is a bar to any action against such officer or the purchaser of such property on account of the same. The object of the notice is to call the attention of the party to the specific property seized, and, while no action is required unless the statutory notice is given, yet the officer is no less entitled to the protection the statute gives him because of the fact that the action is voluntarily begun under the statute. *Wright v. Shelt*, 19 Ind. App. 1; *Firestone v. Mishler*, 18 Ind. 439; *Patterson v. Snow*, *supra*; §§1597-1614 Burns 1901.

Judgment affirmed.

EQUITABLE TRUST COMPANY OF NEW LONDON v.
MILLIGAN.

[No. 3,815. Filed January 6, 1903. Rehearing denied February 4, 1903. Transfer denied April 10, 1903.]

VENDOR AND PURCHASER.—*Failure of Title.*—*Boundaries.*—*Caveat Emptor.*—Where a vendor in possession and claiming to be the owner of a tract of land, pointed out the lines and corners thereof to a prospective purchaser and thereby induced him to purchase the same at an agreed price, and after the delivery of the deed and the payment of the purchase money it was discovered that the deed did not cover the entire tract so pointed out and described, and that the vendor's title did not cover the entire tract, the purchaser may recover the pro rata value of the portion of real estate omitted from the deed. *pp. 21-23.*

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VENDOR AND PURCHASER.—Contract.—Merger.—Evidence.—Where a vendor pointed out the boundaries of a tract of land to a purchaser and afterwards executed a deed which did not cover the entire tract so pointed out, oral evidence of the statements made by the vendor is admissible to show that the deed did not cover the entire tract purchased. *p. 24.*

JUDGMENT.—Clerical Error.—Appeal.—A judgment for damages for failure of title to a portion of real estate purchased by plaintiff will not be reversed because of an error of forty-five square feet in the calculation of the number of square feet omitted from the description in the deed, where the value of the land so omitted was found in the aggregate, and not per square foot. *p. 25.*

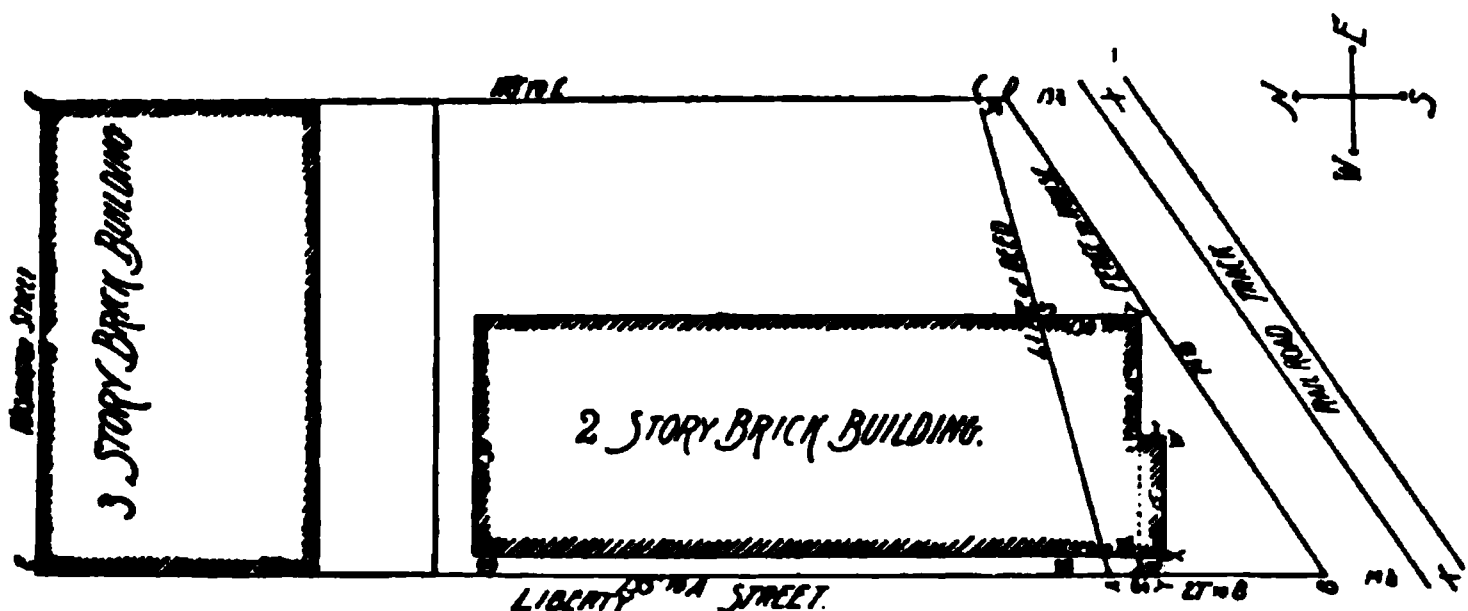
From the Superior Court of Marion County; *J. L. McMaster*, Judge.

Action by Harry J. Milligan against the Equitable Trust Company of New London. From a judgment for plaintiff, defendant appeals. *Affirmed.*

D. M. Bradbury and *F. W. Ballenger*, for appellant.

H. J. Milligan, for appellee.

ROBY, C. J.—Action by appellee against appellant. Special finding of facts and conclusions of law thereon. Judgment for \$1,391.45. It appears from the special findings that appellant was in possession, claiming ownership, of that part of outlot eighty-two, in the city of Indianapolis, designated on the following plat by the letters E, H, D, B.



Appellee was shown the land by a real estate agent, representing appellant, who stated to him that the lot was 60 feet wide on Washington street and 135 feet deep, and that

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the south boundary was the line of the railroad right of way. He called attention to this boundary as an inducement for the appellee to purchase, and stated that by reason of the lot abutting upon the railroad it had an additional value. Appellee had no other information, and believed and relied upon such statements. The agent acted honestly, and without fraudulent purpose. Appellant's title was based upon a mortgage foreclosure. It furnished appellee an abstract the description in which followed the description carried through the proceedings. The title, as shown by the abstract, proving satisfactory, appellee purchased the land, as he supposed, included in the tract above designated, receiving a deed therefor with special covenants amounting to a quitclaim, in which the description contained in the abstract was inserted. He took possession thereunder, and paid the agreed price of \$16,500. Some six months later he discovered that the land described in such deed, and the only part of said lot to which appellant had any record title, was the tract designated on the plat by the letters A, C, E, H; leaving that portion of said lot designated by the letters A, B, C, D, undisposed of. Appellant, as well as its agent, believed that the description contained in the deed covered the entire tract.

The court found specially that at the time of the purchase appellant was in possession of both brick buildings upon said lot in their entirety, and of the tract designated on the cut by the letters S, C, D, T, but that there was no evidence of possession by anyone of the triangular tract south of the building and designated by the letters B, T, V, W, Y, X. It was further found that appellant and its grantor and its grantee, the appellee, did hold adverse and continuous possession of all said lot except the last-mentioned portion thereof for more than twenty years prior to the commencement of the action; that appellee took possession thereof, claiming the same as of right by virtue of his deed from appellant; that the tract last mentioned, imme-

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diately south of the building, had been vacant during all the time covered by the findings until after the conveyance to appellee, sometime after which he executed a quitclaim deed to a third party for a portion thereof, having in the meantime procured a quitclaim deed for the entire lot from appellant's grantor, who had no title to convey. It is further found that the evidence fails to show who has record title to the land south of the line AC, but that it was not held by appellant. The value of the entire tract was found to be \$16,500; the value of that portion described in the deed \$14,500; the triangular piece south of the building \$950. The conclusions of law were that the appellee was entitled to recover the value of the last-mentioned portion of the lot with six per cent. interest from the date of the conveyance, amounting to \$1,391.45, for which sum judgment was rendered, this appeal being taken therefrom.

The rule that the pleading must be good upon the theory adopted by the pleader has been frequently stated. *Miller v. Miller*, 17 Ind. App. 605. Determining the theory of the complaint from the facts stated therein, and not from the statements or admissions of the parties, as seems to be required (*American Wire Nail Co. v. Connelly*, 8 Ind. App. 398), and construing the complaint liberally (§379 Burns 1901), the complaint is held to state facts sufficient to constitute a cause of action.

"If a person sell real estate simply by the description contained on the face of his title papers, he is not accountable for its location, its lines, etc.; but if he undertake to point out to the purchaser the lines, or the place where it lies, or its improvements, he does it at his peril. If he make a mistake it is at his own loss. The rule *caveat emptor* can not apply. When the vendor undertakes to point out and show the particular premises, the lines, the improvements, etc., to the vendee, the law implies a warranty that he is pointing out and showing the true and identical

premises, lines, improvements, etc., that he is selling; and if he make a mistake he must be accountable." *Cowger v. Gordon*, 4 Blackf. 110; *Port v. Williams*, 6 Ind. 219; *Campbell v. Frankem*, 65 Ind. 591.

"He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain liable for that variance." *McFerran v. Taylor*, 3 Cranch 270, 2 L. Ed. 436.

Appellant contends that *Cowger v. Gordon*, *supra*, and *Campbell v. Frankem*, *supra*, were incorrectly decided. The cases have not been overruled, and are, therefore, followed. The criticism made upon them is that the contract between the parties having been reduced to writing, previous oral negotiations are merged therein, and that the terms of the agreement can not be made to appear otherwise than by reference to the writing. The general proposition is well settled, but it does not prevent proof of collateral independent parol agreements between the parties prior to or contemporaneous with the time of the writing, while fraud and mistake may always be shown. The doctrine of merger in nowise applies to them. *Allen v. Lee*, 1 Ind. 58, 48 Am. Dec. 352; *Page v. Lashley*, 15 Ind. 152; *Carver v. Louthain*, 38 Ind. 530; *Maris v. Iles*, 3 Ind. App. 579; *Tyler v. Anderson*, 106 Ind. 185.

Facts averred are sufficient to show payment of money made under a mistake of fact, induced by vendee. *Solinger v. Jewitt*, 25 Ind. 479, 87 Am. Dec. 372; *Fleetwood v. Brown*, 109 Ind. 567; *Tyler v. Anderson*, 106 Ind. 185; *Hays v. Hays*, 126 Ind. 92, 11 L. R. A. 376.

Where there is partial failure of title, the damages recoverable bear the same proportion to the whole purchase money as the value of the part to which title fails bears to the value of the whole property. *First Nat. Bank v. Colter*, 61 Ind. 153; *American Cannel Coal Co. v. Seitz*, 101

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Ind. 182; *Moorehead v. Davis*, 92 Ind. 303; *Hoot v. Spade*, 20 Ind. 326; *Mooney v. Burchard*, 84 Ind. 285.

The burden was upon the appellee. The finding shows that as to the tract south of the building (B, T, V, W, X, Y) he received no title either by deed or possession. As to the residue of the land south of the deed line AC, he did receive possession from appellant. Whether he thereby acquired title or not is not determinable from the record. The judgment is correctly based upon the failure of title to that part of the tract south of the building above referred to.

A further question is made upon the motion for a new trial. Appellant's counsel contend that the dimensions of the tract referred to show that its area is incorrectly estimated. The area, as stated in the findings and as shown by the testimony of the only witness who testified upon the subject, was 397 square feet. Appellant's counsel state that its true area is 315.75 square feet, supporting the assertion with elaborate computation which should have been presented to the trial judge. The actual error in the computation is less than forty-five square feet, and, in view of the finding that the value of the tract was \$950, we are not disposed to direct a new trial.

Judgment affirmed.

UTTER ET AL. v. KERSEY ET AL.

[No. 3,814. Filed April 21, 1903.]

APPEAL AND ERROR.—*Death of Appellee.—Substitution of Parties.*—

Where appellee died pending an appeal from a judgment setting aside a deed by which she conveyed her life estate in certain lands, the appeal can not be prosecuted against her heirs, under §648 Burns 1901, by substituting them as parties. pp. 26-28.

SAME.—*Death of Appellee.—Substitution of Parties.*—The heirs of one who died pending an appeal from a judgment setting aside a deed by which the latter conveyed her life estate in certain real estate are not proper persons to be substituted as appellees, under

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4639 Burns 1901, since there could be no judgment against them for costs, nor could the cause, if reversed, be prosecuted by them in the trial court. pp. 25-28.

From Boone Circuit Court: *B. S. Higgins*, Judge.

Suit by Elizabeth Kersey against Samuel J. Uter and others to cancel a deed. From a judgment for plaintiff defendants appealed and pending the appeal plaintiff died, and her heirs were substituted as appellees. Appeal dismissed.

E. P. Hammond, W. V. Stuart, D. W. Simms and S. M. Ralston, for appellants.

R. P. Davidson, Allen Boulds, A. J. Shelby and J. B. Shelby, for appellees.

HENLEY, J.—This cause was transferred to this Court from the Supreme Court. The action was commenced by one Elizabeth Kersey against appellants to cancel and set aside a deed by which she had conveyed her life estate in certain lands. Elizabeth Kersey was the sole plaintiff in the action, and demanded no other interest or title in the land other than a life estate, and asked no other or different relief than that her deed be canceled and her title to the life estate be quieted. The trial resulted in a judgment and decree canceling the deed, and giving her the right of possession of the land during her lifetime. The defendants to this action appealed from the judgment against them.

Since the filing of the transcript on appeal the said Elizabeth Kersey has died. The submission of the appeal was, upon the motion of the appellants, set aside, and they were permitted to substitute as appellees the heirs of Elizabeth Kersey. The substituted appellees have moved to dismiss the appeal as to them, because they are not proper parties in any capacity, having no interest whatever in the subject-matter, and protesting that they should not be compelled to defend a judgment, the reversal or affirmance of which is of no consequence to them in any way.

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We make no further statement of the pleadings, nor of the facts found by the trial court upon which the judgment was based, because we are convinced that the names of the substituted appellees ought, upon their motion, be stricken from the docket, and the appeal dismissed. By §648 Burns 1901 it is provided: "In case of the death of any or all the parties to a judgment before an appeal is taken, an appeal may be taken by, and notice of an appeal served upon, the persons in whose favor and against whom the action might have been revived, if death had occurred before judgment." Under this section of the statute, this appeal could not be prosecuted against the substituted appellees, (1) because Elizabeth Kersey did not die before the appeal was taken, and (2) her heirs were not "persons in whose favor and against whom the action might have been revived, if death had occurred before judgment." This action having solely to do with the life estate of Elizabeth Kersey, her death casts nothing upon her heirs; and it must be assumed that where it is provided by the statute that, upon the death of a party, his heirs or personal representatives may be substituted, it can only occur in cases where the heirs or personal representatives succeed to the interest in the subject-matter of the action, and most certainly not in cases where the action abates with the death of the plaintiff, and nothing passed to the heirs. It is further provided by our statute (§649 Burns 1901): "The death of any or all the parties shall not cause the proceedings to abate; but the names of the proper persons being substituted, upon consent or upon notice, the cause may proceed." The heirs of Elizabeth Kersey are not the proper persons. The affirmance of the judgment would be of no benefit whatever to them. If this judgment were reversed, there could be no judgment against them for costs; and, if reversed and remanded, this action could not be prosecuted in the trial court in the names of these substituted appellees. It necessarily follows that if the cause could not be prosecuted in the trial court

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by the substituted appellees, an appeal could not be prosecuted against them here. In an action of this kind, we do not see how a court could render a valid judgment of any kind against the heirs of Elizabeth Kersey. If appellants are placed in the best possible position, and the action of Elizabeth Kersey to cancel the deed defeated, and, following this action, she is held liable for the rental value of the land during the time she kept appellants out of possession, this rental value would be a general debt against her estate. It would be a claim against the administrator of her estate, and must be so collected, or not at all. Neither the heirs nor remainder-men could be held for such a claim.

The names of the substituted appellees are stricken from the docket, and the appeal is dismissed.

UNION LIFE INSURANCE COMPANY OF INDIANA
v. JAMESON.

[No. 4,316. Filed April 21, 1903.]

INSURANCE.—Evidence.—Answer Not Responsive to Question.—Where a physician as a witness in an action on an insurance policy had stated that by alcoholism he meant the excessive use of alcohol, or beverages containing alcohol, an answer to the question, whether the effects produced by alcohol were easily observed under circumstances of that kind, that in excessive alcoholism they are easily observed, was properly stricken out, the same not being responsive to the question. *p. 30.*

SAME.—Evidence.—Harmless Error.—Where insured agreed in his application not to use intoxicating liquor to excess and not to practice any pernicious habit that obviously tends to shorten life, the refusal of the court to permit a medical expert to state whether he regarded the habitual use of intoxicating liquor to excess a pernicious habit was harmless, since defendant was not required to show both the use of liquor to excess and some pernicious habit to constitute a violation of the contract. *pp. 30, 31.*

SAME.—Evidence.—Where defendant in an action on an insurance policy introduced a witness who testified that he had worked at the same place with insured, and had seen him drink liquor, and had seen him drunk, there was no harmful error in permitting

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the witness to testify on cross-examination as to complaints he made to witness of pains in his head and chest. *p. 31.*

INSURANCE.—*Instruction.*—*Construction of Contract.*—An instruction in an action on an insurance policy to the effect that such a contract should be liberally construed with a view to effectuate its purpose and if there was any ambiguity in an interrogatory in the application it should be construed most strongly against the company, and most favorably to the insured, in whose favor all doubts should be resolved, was erroneous, where the contract of insurance was plain and unequivocal. *pp. 31-33.*

SAME.—*Warranties.*—*Intoxicating Liquors.*—*Instructions.*—Where insured warranted that he would not use intoxicating liquors to excess nor practice any pernicious habit that obviously tended to shorten life, and payment of the policy was contested on the ground that insured drank to excess, it was error to instruct the jury that if they found from the nature of the deceased's employment, and his physical condition occasioned thereby, he became weak and exhausted, and was compelled to, and did, resort to stimulants, as he believed, for his own protection, and to enable him to continue his labors, and, in so doing, occasionally drank intoxicating liquors, even to the extent of being under the influence thereof, such indulgence could not be termed excessive, and could not be urged as a defense, unless you further find that such indulgences were excessive, or that they tended to, or did, shorten his life, since the instruction left it with insured to determine for himself what would be an excessive use of liquors. *pp. 33, 34.*

From the Superior Court of Allen County; *J. H. Aiken*, Judge.

Action by James H. Jameson against the Union Life Insurance Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

Allen Zollars, C. H. Worden and F. E. Zollars, for appellant.

Wilmer Leonard and Elmer Leonard, for appellee.

ROBINSON, J.—Appellee obtained a judgment upon a policy of insurance. Overruling a motion for a new trial is the only error assigned that is argued.

In the application signed by the insured is the following: "I, the applicant for insurance, hereby declare and warrant that I am not now afflicted with any disease or disorder, so far as I know, and that I do not now, and will

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not, use intoxicating liquors to excess, nor practice any pernicious habit that obviously tends to shorten life, and that the foregoing application, and this declaration, together with the answers and explanations made, or to be made, to the medical examiner to the various questions in parts one and two of this application and examination shall constitute a warranty, and shall form the exclusive and only basis of the contract between myself and the Union Life Insurance Company of Indiana." The insured also made certain answers to questions as follows: "To what extent do you use intoxicating liquors? (Avoid the use of the word 'temperate,' it is indefinite.) A. A glass of beer occasionally. State full particulars as to what your habits are in this respect. A. Very moderate. Have you ever used them to excess, or to the extent of impairing your health? A. No."

Appellant defended upon the ground that after the date of the application, April 28, 1899, the insured used intoxicating liquors to excess, and that such dissipation contributed to his death October 12, 1900. After a witness—a physician—had stated that he meant by "alcoholism" the excessive use of alcohol, or beverages containing alcohol, he was asked: "Are the effects produced by alcohol easily observed under circumstances of that kind? A. In excessive alcoholism they are easily observed." There was no reversible error in striking out this answer. The answer is not responsive to the question. The witness had defined "alcoholism" as the excessive use of alcohol, and it was about this use of alcohol that he is now asked, and not about excessive alcoholism. From the witness' own definition there must be a difference between "alcoholism" and "excessive alcoholism," and the question was not concerning the latter.

There was no reversible error in refusing to permit a medical expert to state whether, in his opinion, he regarded the habitual use of intoxicating liquor to excess as a per-

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pernicious habit. In the application the insured agreed not to use intoxicating liquor to excess, and not to practice any pernicious habit that obviously tends to shorten life. If he did either, he violated the terms of his contract. He did not agree not to use intoxicating liquor, but did agree that he would not use it to excess. Appellant was not required to show both the use of liquor to excess and also some pernicious habit. If the proof showed that the insured habitually used intoxicating liquor to excess, and the question assumes that he did, the terms of the contract were violated by the insured, whether such use was shown to be a pernicious habit or not. Moreover, as the witness testified in answer to other questions as to the effect of the excessive use of intoxicating liquor, we fail to see how there could be any harmful error in not permitting an answer to the question.

A witness testified on direct examination that he worked at the same place with the insured several months, and had seen him drink liquor, and had seen him drunk. There was no harmful error in permitting the witness to testify on cross-examination as to complaints made by the witness of pains in his head and chest. It was proper to go into the circumstances in connection with the alleged intoxication. Whether the insured was intoxicated at any time, or used liquor to excess, was a question for the jury to determine, and it was proper for them to consider such facts and circumstances as would show the actual physical condition of the insured at the time.

Complaint is made of the following instruction: "A contract of insurance, like the one in the case at bar, is by the court liberally construed with a view to effectuate its purpose. The language of the policy and of the interrogatories and provisions of the application are prearranged by the company. In its preparation the insured has no part. Whatever there may be in the language so prepared by the company which has any tendency to defeat the main

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purpose of the contract should be strictly construed against the company. If there is any ambiguity in an interrogatory propounded to the applicant, it should be construed most strongly against the company, and most favorably to the insured, in whose favor all doubts should be resolved."

While the above instruction contains a correct statement of a principle of the law governing the construction of contracts of insurance (*Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769), yet, as the language indicates, it is a rule for the guidance of courts in the construction of such contracts. It has been so long and often held that it is the duty of the court, and not the jury, to construe a contract that is plain and unambiguous, that the citation of authorities is unnecessary. The first sentence in the instruction states a matter of no concern to the jury, and, if it had any effect, the jury doubtless inferred that they should give the contract a liberal construction. It may be the fact, also, that the language of the policy and the provisions of the application were prearranged by the company, and that in the preparation of the policy the insured had no part, but there was no evidence to that effect. Had these been material facts in appellee's case, an instruction could not assume their truth, where they were not only not proved, but about which no testimony was offered. But in the concluding part of the instruction, that, "if there is any ambiguity in an interrogatory propounded to the applicant, it should be construed most strongly against the company, and most favorably to the insured, in whose favor all doubts should be resolved," it is left to the jury to determine whether there is any ambiguity in the interrogatories asked the applicant; and, if there is, they are told how they should then construe it. We fail to see how the jury could otherwise understand the instruction, than that they were to construe the contract, and that this construction should be made according to certain rules. It is not claimed that the contract is ambiguous. No attempt was made to explain

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any supposed ambiguity. As the contract was plain and unequivocal, it was error to leave its construction to the jury. See *Masons, etc., Assn. v. Brockman*, 20 Ind. App. 206; *Dixon v. Duke*, 85 Ind. 434; *Louthain v. Miller*, 85 Ind. 161; *Dutch v. Anderson*, 75 Ind. 35.

Complaint is also made of the sixteenth instruction: "If you find from the evidence, that from the nature of the deceased's employment, and his physical condition occasioned thereby, if it were so occasioned, he became weak and exhausted, and was compelled to, and did, resort to stimulants, as he believed, for his own protection, and to enable him to continue his labors, and, in so doing, occasionally, or at times, drank intoxicating liquors even to the extent of being under the influence thereof, such indulgence could not be termed excessive, and could not be urged as a defense to this action, unless you further find from the evidence that such indulgences were excessive, or that they tended to, or did, shorten his life." This instruction is erroneous. If the jury understood it to mean—and we think they would so understand the language used—that the insured might use intoxicating liquors to any extent that he believed necessary for his own protection, and to enable him to continue his labors, it left it with the insured to determine for himself what would be an excessive use of liquors. The contract was violated if he used intoxicating liquor to excess, and to say, in effect, that he might make such use of liquors as he believed for his own protection is to annul that part of the contract. Moreover, the instruction is contradictory. It tells the jury that if they find the physical condition of the insured was such that he resorted to stimulants, as he believed, for his own protection, and to continue his labors, and at times drank liquors, even to the extent of being under the influence thereof, such indulgence could not be termed excessive, and would not be a defense unless they found such indulg-

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ences were excessive, or that they tended to, or did, shorten life; that is, while the court attempts to designate what indulgences would not be excessive, it leaves it with the jury to say whether these same indulgences were excessive. He had said, by a promissory warranty, that he would not use intoxicating liquors to excess, nor practice any pernicious habit that obviously tended to shorten life. If he did either he avoided the policy. The instruction was contradictory, and could have no other tendency than to mislead the jury, or leave them in doubt as to what the law applicable to the case was. See *McEntire v. Brown*, 28 Ind. 347; *Somers v. Pumphrey*, 24 Ind. 231; *Summerlot v. Hamilton*, 121 Ind. 87; *Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611; *Kirland v. State*, 43 Ind. 146, 13 Am. Rep. 386; *Toledo, etc., R. Co. v. Shuckman*, 50 Ind. 42; *Wenning v. Teeple*, 144 Ind. 189; *Pittsburgh, etc., R. Co. v. Noftsgar*, 148 Ind. 101. See, also, *Northwestern, etc., Assn. v. Bodurtha*, 23 Ind. App. 121, 77 Am. St. 414.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

STATE, *EX REL.* ROSS, v. ANDERSON.

[No. 4,645. Filed April 22, 1903.]

CORPORATIONS.—Elections.—Right of Stockholder to Vote.—The provision of §3425 Burns 1901, that each stockholder shall have one vote for each share owned and held by him for ten days previous to the meeting of the corporation, and of §5055 Burns 1901, that each share shall entitle the owner to one vote, are not merely directory, but are express reservations from granted powers, securing to the stockholder an important and valuable right. *pp. 38-46.*

SAME.—Officers.—Election.—Provisions in the articles of association of a corporation, organized under the statute of this State regulating the organization of manufacturing and mining companies, that the affairs of the association shall always be managed by a certain named board of directors, unless they shall become incapacitated, resign or die, and that certain named persons shall

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hold the other offices of the company so long as they shall remain shareholders, unless they shall become incapacitated, resign or die, are in contravention of the statute providing for the annual election of officers, and are inoperative and void. *pp. 38-46.*

From Randolph Circuit Court; *A. O. Marsh*, Judge.

Action by the State, on the relation of Melissa J. Ross, against Edwin A. Anderson. From a judgment in favor of defendant, relatrix appeals. *Affirmed.*

Theodore Shockney and *J. A. Shockney*, for appellant.

J. S. Engle, *F. S. Caldwell* and *W. G. Parry*, for appellee.

BLACK, P. J.—In a verified complaint or information on the relation of Melissa J. Ross against Edwin A. Anderson, the appellee, it was claimed that he had usurped her office of director of a corporation organized under the laws of this State, the Ross Carriage Manufacturing Company, and also her office of bookkeeper of that company; and the appellant sought a decree declaring the establishment of the right of the relatrix to each of said offices, and a judgment for damages for being kept out of them. The appellant's demurrer to the answer of appellee was overruled, and this ruling is alone assigned as error.

The answer showed: That the company was organized as a corporation, pursuant to the statutes of this State, regulating the organization of manufacturing and mining companies, October 23, 1899, and thereafter had been, and still was, doing a manufacturing business at Union City, Indiana; that at its organization the stockholders adopted articles of association, and among the articles those numbered five and six are as follows: "Article 5. The prudential affairs of this association shall always be managed by a board of directors to consist of Edwin A. Anderson, Oliver M. Downard, George W. Ross, and Melissa J. Ross, unless they shall become incapacitated, resign, or die; in either of which events the successor or successors shall be elected from among the stockholders of said association on

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the first Monday in October in each year, by the holders of the corporate stock of said association, each holder being entitled at such election to one vote for every share so owned or controlled by such stockholder; except that in the absence of said George W. Ross, or in the event of his incapacity or death, and in either of such events, Melissa J. Ross, one of the subscribers hereto, if she shall at the time be a stockholder in this company, shall fill the vacancy and perform the duties for and instead of said George W. Ross.

Article 6. George W. Ross shall be the president of the board of directors, Edwin A. Anderson shall be the secretary of said board, Oliver M. Downard shall be the treasurer of said board, and Melissa J. Ross shall be the vice-president thereof and in addition thereto shall keep the books of said association. Each of said persons shall hold said office and offices so long as they shall remain shareholders in said association, unless they shall become incapacitated, absent themselves from the business, resign, or die; in either of which events their successor or successors shall be elected thereafter from among the stockholders of said association on the first Monday in October, in each year, by the board of directors of said association; except that in the absence, incapacity, resignation, or death of the said George W. Ross, one of the subscribers hereto, Melissa J. Ross, in either of such events, shall, if she be a stockholder in said association at the time, fill the vacancy and perform the duties of said office in place of and instead of said George W. Ross. The duties of said offices shall be the same as are usually imposed on like officers of similar corporations, but the vice-president shall, in addition to the other duties of her office, be the bookkeeper of this association and keep the books thereof," etc.—the remainder of this article relating to the meetings of the board of directors.

It was alleged that at the organization of the company the persons so named in the articles as directors, including

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the relatrix, were selected and named as the directors of the company, and became and constituted its board of directors by virtue of the provisions of said article five, and not otherwise, and so continued until October 7, 1901, the first Monday of that month; and they were at no time prior to that date elected or selected as directors, except by and under the provisions of said article five, and by causing their names to be inserted in that article at the organization of the company; that the persons named as president, secretary, treasurer, vice-president, and bookkeeper at that organization assumed the duties of their said respective offices, and they continued to discharge such duties until October 7, 1901, under and by being so named in that article, and they were not selected or elected to such offices prior to that date, except by and under the provisions of that section and by causing their names to be inserted therein as incumbents of such offices; that there was not, and had not been, in the articles of association, by-laws, rules, and regulations of the company any provisions for an annual or other meeting of the stockholders of the company except the provisions of said sections five and six; that there was no annual or other meeting of the stockholders on the first Monday of October, 1900, and no successors of the members of the board of directors were then chosen or elected by the stockholders. It was alleged that on the first Monday in October, 1901, pursuant to notice duly and legally given to each and all of the stockholders, a regular annual meeting of the stockholders was held at the principal office of the company, at which all the stockholders representing all the stock and owning and holding all the stock attended. The answer then showed in detail and at length the election by the stockholders at this meeting of four directors for the ensuing year, the number provided for by the articles of association and by-laws, each person so elected receiving votes representing a majority of the shares of stock; that the members of the original board

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were thus elected except the relatrix, instead of whom the appellee was elected, he being then and since that time a stockholder and eligible to the office; and the pleading further set forth at length the fact of the election by the board of directors of the executive officers, the relatrix not being one of them, but the appellee being so elected as secretary and bookkeeper, and that he was exercising the functions and duties of a director and of secretary and bookkeeper pursuant to these elections and under the authority thereof.

The relatrix depends upon the provisions of articles five and six of the articles of association in asserting a right to continue in the office of director and in the so-called office of bookkeeper; while the appellee bases his defense upon his election to the office of director at the annual meeting of the stockholders, he being eligible, and upon his election as secretary and bookkeeper by the board of directors. Therefore the dispute relates to the question as to the effectiveness or binding force of those articles.

Assuming the validity and obligatory force of article five would imply that the persons named therein as directors would continue to constitute the board of directors, and the affairs of the association would continue to be managed by such board always, unless they should become incapacitated, resign, or die, the election of a successor to any of them by the stockholders being authorized only in case of incapacity, resignation or death, such election of successors, if any, to be on the first Monday of October, annually, except, however, that if George W. Ross, one of such directors, should be absent, or should become incapacitated, or should die, the relatrix, another one of such directors, if then still a stockholder, should fill the vacancy and perform the duties of George W. Ross, in addition to her own duties. Though by transfers of shares of stock the original directors should come to be the owners of a minority of the stock, and become obnoxious to the owners of the majority of the shares, they would still continue always to be directors and as such to

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control the affairs of the company, except those of them who should become incapacitated, or resign or die, except, further, that the absence or incapacity or death of George W. Ross would not furnish occasion for the election of a successor, but would devolve the duties of two directors upon the relatrix. Substantially the same provisions were made by section six, relating to the executive officers of the corporation, as those made by section five, relating to the members of the board of directors; the successors, if any, of such executive officers to be elected annually by the board of directors, except in the case of the presidency, a vacancy in which would devolve its duties on the relatrix if she were still a stockholder.

The possible results of such provisions need only be suggested to justify condemnation on the grounds of their unfairness and impolicy. The corporation derives its existence, powers, duties, and obligations from the statutes alone, the express laws of the State. Not only is it confined to the objects and purposes of its creation, but the instrumentalities and methods by which it performs its functions must not be in conflict with its fundamental statutory authority. Those who undertake its organization may not select for their observance only such provisions of law as seem to them to suit their purposes, rejecting or ignoring other statutory requirements, and substituting plans and methods of organization, regulation, or operation not within the intention of the legislature. The State, acting within its authority, having tendered the privileges and immunities of the corporation, and having prescribed the conditions and limitations under which they may be obtained and enjoyed, those who accept the privileges and immunities must be regarded as agreeing and obligating themselves to conform to the conditions and limitations expressed or fairly implied. If, in their organization of a corporation, the existence of which is authorized and provided for by statute, they insert in their articles of associ-

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ation provisions not in agreement with the statutes of whose provisions they thus seek to avail themselves, they can not, as to such conflicting provisions, be regarded as accepting the State's tender, but must be considered as attempting to such extent to substitute their own counter propositions as to the matters to which such provisions relate. If they may be regarded as having so far complied with legal requirements as to have organized a corporation under the statutes, the corporation must be considered as governed by the statutory requirements, rather than by such inconsistent provisions of the articles of association.

Among the provisions relating to corporations generally in this State are the following: "Corporations shall, when no other provision is specially made, be capable * * * to elect, in such manner as they shall determine, all necessary officers, * * * determine the * * * number of shares that shall entitle the members to one or more votes (provided, each stockholder shall have one vote for each share owned and held by him for ten days previous to the meeting of the corporation), * * * and the tenure of office of the several officers." §3425 Burns 1901. Beginning with §5051 Burns 1901, other provisions are specially made for manufacturing and mining companies—corporations such as that here in question. It is provided by that section that persons desiring to form a company for such purpose shall prepare and file, as therein directed, "a certificate in writing, which shall state * * * the number of directors and their names who shall manage the affairs of such company for the first year," etc. In §5054 Burns 1901 it is provided that the directors of such a corporation, "after one year from the organization of the company, shall be elected by the stockholders annually; and the directors thus chosen, or first appointed, shall elect the president thereof." By the next section (§5055) it is provided that "The directors of such company shall annually elect a secretary and treasurer. * * * Absent stockholders

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may vote by proxy, and each share of stock shall entitle the owner thereof to one vote." Thus it is expressly required that the certificate or articles of association shall state, among other things, the number and names of the directors to manage the affairs of the company for the first year. A statement of the names of directors to manage the affairs of the company always is, of course, in plain disagreement with this statutory requirement. The persons who effectually organize such a corporation thereby subject themselves, as members thereof, to the provisions specially made for such a corporation, that after one year from the organization the directors shall be elected by the stockholders annually; that the directors shall elect a president, and shall annually elect a secretary and treasurer; and that in the election in which the stockholders thus have a right to participate—the election of directors—each share of stock shall entitle the owner thereof to one vote.

The appellee, by his answer, does not attack, as counsel for appellant seem to suppose, the existence of the corporation. Both parties assume and rely upon the actual existence of the corporation, in which each of them is claiming the right to exercise official functions. The proposition urged by the appellant that, where the law authorizes a corporation, and there is an effort in good faith to organize a corporation under the law, and thereupon, as a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation *de facto*, and as a general rule the legal existence of such a corporation can not be inquired into collaterally, although some of the required legal formalities may not have been complied with, and that ordinarily such an inquiry can only be made in a direct proceeding, brought in the name of the State (*Hasselman v. United States Mort. Co.*, 97 Ind. 365, 368), is well enough supported by authority; but it seems not to be applicable to the controversy between the parties in this case. The controversy here is rather whether the action

of the corporation in the election of its directors and executive officers in conformity to the positive requirements of the statutes concerning such matters should be set aside by the courts in behalf of one stockholder because such conduct is not in agreement with the provisions in the articles of association which conflict with such statutory requirements. To sustain the claim of appellant would seem to accord to the organizers of the corporation greater power than the sovereign by whose will alone it exists and enjoys its privileges and immunities.

The general statute under and by virtue of which a private corporation is organized must be regarded as entering into and constituting a part of the articles of association, through which, together with the statutes authorizing such association, it comes into existence and has power to act as a body politic and corporate; and it is a reasonable doctrine that when matter is introduced into such articles, which is not authorized by the enabling statute, it constitutes no part of the charter of the corporation, but should be rejected as surplusage, except where it may be treated as a by-law. "The charter of a corporation formed under a general law consists of its articles of association and the law under which it is organized." *Bent v. Underdown*, 156 Ind. 516.

In *O'Brien v. Cummings*, 13 Mo. App. 197, quoted in *Thompson, Corporations*, §216, it was said: "The general statute (R. S., Ch. 21), when aroused into specific operation by a compliance with its terms on the part of an association of persons and capital, unites itself with the terms and details of such a compliance; the law and the articles of association become, as it were, the compact between the state and the association, and this constitutes a charter of the body politic. * * * But no provision in the articles, which is not responsive to some specification in the law, can have any such force or effect. Such a provision, not called for by the law, will be a mere voluntary

proposal from the association. It will be lacking in the essential elements of a compact, will derive no operative energy from the statute, and can have no claim to the dignity or effectiveness of a charter regulation." In that case there were in the articles a limitation as to the number of shares which a stockholder might own, and a limitation on the right of transfer of stock, but the statute contained no provisions for the statement of such matters in the articles. It was held, that such provisions of the articles (which were not repugnant to a statute, but were not responsive to any specification of the statute) had no greater force than that of corporate by-laws. See, also, *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 23 Pac. 569, 19 Am. St. 134; *Thompson, Corporations*, §1015.

In *Cook, Corporations* (5th ed.), §4, it is said that the law is clear that the articles of association of a corporation organized under a general act are allowed to contain only those matters and statements which are required by the statute itself, and the incorporators are not at liberty to insert additional provisions and regulations; and, if such additional provisions and regulations are inserted, they are void. "The law," it is said, "does not recognize them. They do not constitute a part of the charter, but are rejected as surplusage and extraneous matter. If the articles of association contain the matters required by the statute and also contain additional matters, the former are sufficient to sustain the charter, and the additional matter does not violate the legitimate part of the articles, but the additional matter is disregarded by the law as though it had not been written. All of the decisions hold that any statements or restrictions inserted in the articles of association, outside of the statements required by the general act allowing the incorporation, are unauthorized and void." See 7 Am. & Eng. Ency. Law (2d ed.), 654; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 29, 9 Sup. Ct. 409, 32 L. Ed. 837; 12 Am. R. & Corp. Rep., 498, note 30. Powers

other than those authorized by the general act can not be placed in the articles of incorporation. *People, ex rel., v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. 319. By-laws being continuing or permanent rules in accordance with which the corporate affairs on all occasions to which their provisions relate are to be conducted, they must not be in conflict with the charter; and when, by their terms, they do so conflict, the charter prevails. They must be reasonable, and "must not interfere with the vested and substantial rights of the stockholders; and they must not be contrary to public policy or the established law of the land." They can not modify the articles of incorporation in any of the particulars required by statute to be stated in the articles of incorporation. Cook, Corporations (5th ed.), §4a; *Guinness v. Land Corp. of Ireland*, L. R. 22 Ch. Div. 349. A by-law which limits or regulates the corporate powers which the charter confers on the directors may be disregarded by them. *Union Mut. Fire Ins. Co. v. Keyser*, 32 N. H. 313, 64 Am. Dec. 375. No by-law is valid which either enlarges or restricts the rights and powers conferred by the charter or governing statute. Thompson, Corporations, §1011. When the charter gives the stockholders the power to elect the directors, the corporation can not, by a by-law, take away this power. Thompson, Corporations, §1012; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237. A by-law restricting the right of members of a church to vote as authorized by statute was void. *People, ex rel., v. Phillips*, 1 Denio 388. A by-law, if divisible, may be good in part, though invalid in another part. *Amesbury v. Bowditch Mut. Fire Ins. Co.*, 6 Gray (Mass.) 596; *Rogers v. Jones*, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493. So, a provision inserted in the articles of association which is in conflict with the requirements of the enabling statute can not be applied either as a part of the charter or as a by-law.

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We can not agree that the proviso of §3425 Burns 1901, that each stockholder shall have one vote for each share owned and held by him for ten days previous to the meeting of the corporation, or the provision of §5055, *supra*, that each share shall entitle the owner to one vote, is merely directory. The proviso is an express reservation or exception from granted powers, and each of these statutes secures to the stockholder, as such, an important and valuable right, to deprive him of which would be plainly contrary to the positive provisions entering affirmatively into the organic law of the corporation. Though under the provisions of §5055, *supra*, all officers of a manufacturing company shall serve until their successors are elected and qualified, yet the provisions of this and the next preceding section that the directors, after one year from the organization, shall be elected by the stockholders annually, and that the directors thus chosen or first appointed shall elect the president, and that the directors shall annually elect a secretary and treasurer, are provisions which may not be successfully evaded by contrary provisions in the articles of association or the by-laws, and such contrary provisions may properly be ignored, and elections held in conformity to the statute may not be set aside because of such contrary provisions in the articles or by-laws. Though by statute (§5055 Burns 1901) voting by proxy is authorized, yet the right so to vote is conferred on absent stockholders (and a proxy is always revocable, Cook, Corporations, 5th ed., §622e), and at every election by stockholders each share entitles the owner thereof to one vote. Articles of association, though entered into by all the organizers, can not, nor can a by-law of the corporation, take away from any stockholder this right to vote his shares of stock, in person or by his proxy, at all future elections by the stockholders; otherwise the voting power, connected by statute with the ownership of each share of stock, might

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be permanently separated. See *Brewster v. Hartley*, *supra*; Cook, Corporations (5th ed.), §622.

The devices by which the organizers of the corporation sought, in articles five and six, to tie up and permanently attach to themselves the control of the affairs of the corporation, regardless of the rights of the owners of the majority of the stock, must be held to be inoperative and void so far as they contravene the statutes under which the corporation exists and operates. As between the parties to this action, the persons named in the articles as the members of the board of directors were thereby made directors for one year, and until their successors were elected and qualified; but the provision that they should be the directors always was void, and their successors, elected in accordance with the statute, were entitled to exercise the functions of such office, and to elect the executive officers, including the appellee.

Judgment affirmed.

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[No. 4,289. Filed April 23, 1903.]

DAMAGES.—Landlord and Tenant.—Nominal Damages.—Evidence.—

Where in an action by a tenant for damages for wrongful eviction the defendant pleaded a complete defense to the action and introduced evidence in support thereof, but nothing in mitigation of damages, and there was evidence showing actual damages, capable of estimation with reasonable certainty, a verdict in favor of plaintiff for mere nominal damages was erroneous.

From St. Joseph Circuit Court; *W. A. Funk*, Judge.

Action by Edward E. Paxson against Edwin R. Dean for damages for wrongful eviction. From a judgment in favor of plaintiff for mere nominal damages, he appeals. *Reversed.*

George Bradshaw and *J. W. Kitch*, for appellant.

George Ford and *J. P. Creed*, for appellee.

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ROBINSON, J.—Appellant avers in his complaint that in June, 1901, he was in possession of certain office rooms belonging to appellee; that, while appellant was temporarily absent, appellee obtained the keys to the premises through misrepresentation, and thereafter wrongfully, unlawfully, and maliciously dispossessed appellant of the use of the rooms for thirty days; that appellee unlawfully removed appellant's furniture, fixtures, and dental supplies and tools from the office, and removed appellant's signs from the doors, windows, and walls; that part of the furniture and fixtures was defaced, lost, and broken; that appellee leased the rooms to another dentist, who had possession about thirty days—all to appellant's damage. Appellee answered the complaint: (1) General denial; (2) surrender of possession by appellant; (3) pleading a lease, and also a contract between the parties by which appellant agreed that during the term he would abstain from the use of intoxicating liquor, and, if he failed to do so, that upon thirty days notice he would vacate the rooms; a violation of the agreement; that, on a date named, appellant agreed that he had violated his contract, waived the thirty days notice, and agreed that all matters should be referred to appellant's brother, and agreed that any settlement which might be made between appellee and the brother, acting for appellant, should be a final adjustment of the matter, and might include the surrender of the lease and premises; that thereupon appellee and the brother agreed that the premises should be vacated by appellant, and surrendered to appellee, and the lease canceled, whereupon the brother removed from the premises the effects of appellant, and surrendered the premises to appellee, and the lease was canceled. Trial by jury, and verdict in appellant's favor for \$1, for which sum judgment was rendered, and also for \$1 for costs of suit. The only question argued is the denial of a new trial.

Upon the subject of damages the court instructed the jury: "If you find from the evidence that the plaintiff is entitled to recover, you should assess as his damages an amount sufficient to cover for the value of the tools, furniture, and fixtures that were taken away and not returned; for the damages to the tools, furniture, and fixtures that were taken away and returned; for the loss of materials taken away and not returned; for the amount paid in rent by the plaintiff for the time he was dispossessed of the offices; for the value of the signs that were taken away and not returned; and for the expense of replacing the same, and the expense of repairing, cleaning, and replacing the furniture, fixtures, and tools into the office."

Counsel for appellant argue that upon the subject of damages this instruction was the law by which the jury should have been bound in returning its verdict; that the jury necessarily found against appellee on his third paragraph of answer, because it found in appellant's favor in some amount; that, being entitled to a verdict, he was entitled to such damages as the evidence shows he had sustained. In actions for personal injuries, malicious prosecution, and the like, the amount of damages to be awarded by the jury is almost wholly within the discretion of the jury, for the reason that there are no fixed standards of value from which to determine the amount. In such cases the court will hesitate to interfere with a verdict unless the jury have plainly abused the discretion vested in them. However, in these cases a verdict for inadequate damages may be set aside. See *Miller v. Delaware, etc., R. Co.*, 58 N. J. L. 428, 33 Atl. 950; *Phillips v. London, etc., R. Co.*, L. R. 5 Q. B. D. 78, 29 Moak Eng. Rep. 177. But in an action for damages for injury to property which has a value capable of estimation by direct proof, this discretion is, to an extent, limited.

The court properly instructed the jury that compensatory damages only could be allowed. And if the jury had

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returned a verdict in appellee's favor, we could not, on appeal, have disturbed the conclusion thus reached, for the reason that there is evidence which could be said to authorize such a verdict. The third paragraph of answer pleads a complete defence to the action, and there is evidence in the record which would have been held sufficient on appeal to support all its material allegations. It is true the evidence was directly conflicting upon the question whether the injury averred to have been done the property was done by appellee, but the jury were the exclusive judges of the credibility of the witnesses. If the jury had found the allegations of the answer to be true, they could not have found damages in appellant's favor in any amount. It is manifest, however, from the verdict, that the jury found against appellee upon the answer, for the reason that they found appellee liable for damages. If the jury were warranted in finding for appellant on the evidence, and they did so find, and there is evidence to support such a finding, then appellant was entitled to a larger sum than was given. The undisputed evidence shows that the damages suffered were far in excess of the amount allowed by the jury. Among the issues necessarily found by the verdict in appellant's favor were that the property was damaged, and that the damage was caused by the wrongful acts of appellee. The remaining duty devolving upon the jury was to fix the amount, and this amount must be ascertained from the evidence before them and not otherwise.

It is quite true that the jurors are the sole judges of the credibility of witnesses and the weight of evidence, and that with the proper exercise of their judgment the court should not interfere, but it will not do to say that they are clothed with an arbitrary discretion whether they will consider or disregard the evidence. Why the jury in this case saw proper to give appellant a verdict, and then defeat the purpose of the verdict by disregarding and rejecting undis-

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puted evidence, is not capable of explanation. If they desired to express their disapproval of appellant's cause of action, they should have found for the appellee. The verdict may have been the result of an unseemly compromise, or of a mistake, but, in any event, it is not, upon the face of the record, a verdict "according to law and evidence;" and to permit a conclusion reached in disregard of either to stand could not be said to be a due administration of public justice. As the undisputed evidence shows not only an actual damage to appellant's property, but also, with reasonable certainty, the extent of such damage, a verdict in name for appellant, but in substance for appellee, has no legitimate basis upon which to rest. See *Watson v. Harmon*, 85 Mo. 443; *Whitney v. City of Milwaukee*, 65 Wis. 409, 27 N. W. 39, *Smedley v. Chicago, etc., R. Co.*, 45 Ill. App. 426; *Brown v. Foster*, 37 N. Y. Supp. 502; *McDonald v. Walter*, 40 N. Y. 551; *Kerr v. Union R. Co.*, 45 N. Y. Supp. 819; *Gartner v. Saxon*, 19 R. I. 461, 36 Atl. 1132; *Williams v. Reynolds*, 86 Ill. 263; *Nading v. Denison, etc., R. Co.*, 22 Tex. Civ. App. 173, 54 S. W. 412; *State, ex rel., v. Wilson*, 90 Ind. 114.

Judgment reversed.

MUNCIE NATURAL GAS COMPANY v. ALLISON ET AL.

[No. 4,370. Filed April 23, 1903.]

EMINENT DOMAIN.—*Condemnation of Easement for Pipe-Lines for Natural Gas.*—*Measure of Damages.*—*Instruction.*—An instruction in a proceeding to condemn an easement for the purpose of laying pipe-lines for natural gas, that in estimating the damages the jury should not consider any injuries which might result to plaintiffs from any negligence or unskillfulness of defendant in the operation and maintenance of its pipe-lines over the strip of land sought to be appropriated, since the plaintiffs would have the same right to sue for and recover damages for such negligence or unskillfulness as would any other person injured thereby, states the law correctly. p. 52.

SAME.—*Condemnation of Easement for Pipe-Lines.*—*Measure of Damages.*—An instruction that the assessment of damages for property con-

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demned for a pipe-line must relate "to the time of the condemnation" is equivalent to an instruction that the assessment of damages must relate to the time of the filing of the instrument of appropriation. pp. 52, 53.

TRIAL.—*Refusal of Correct Instructions.*—No error was committed in refusing instructions where instructions given by the court contained a full and complete statement of the law applicable to the issues and covered every point mentioned in the refused instructions. p. 52.

From Delaware Circuit Court; *J. G. Leffler*, Judge.

Proceeding by the Muncie Natural Gas Company against William L. Allison and wife to condemn an easement for natural gas pipe-lines. From a judgment of the circuit court awarding defendants damages, plaintiff appeals. *Affirmed.*

Rollin Warner and *A. W. Brady*, for appellant.

W. W. Orr and *F. H. Stradling*, for appellees.

HENLEY, J.—This action was commenced by the appellant against the appellees to condemn an easement for the purpose of laying its pipe-lines, in prosecuting its business of supplying natural gas to its patrons in this State. The action is based on §§5103-5108 Burns 1901, Acts 1889, p. 22. William L. Allison is the owner in fee of the land over which the easement is sought. The easement sought to be condemned is along and within the bounds of the public highway. Appraisers were duly appointed, and filed their award, to which appellees filed exceptions. The cause was submitted to a jury for trial in the circuit court, and verdict returned against appellant for \$125. Appellant moved for a new trial, which motion was overruled, and judgment rendered upon the verdict in favor of the appellees.

The only questions discussed by counsel for appellant relate to the action of the trial court in overruling appellant's motion for a new trial.

Counsel for appellant confine their argument to the questions arising upon the refusal of the trial court to give to

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the jury instructions numbered one and two. These instructions were as follows: "(1) The measure of the damages which the plaintiffs, William L. Allison and Josie M. Allison, are entitled to recover in this cause is the actual damage occasioned by the appropriation of the easement described in the instrument of appropriation over the strip of land ten feet wide, an easement over which has been appropriated by this proceeding, taking such damages as of the date of the 15th day of October, 1901, the day when the instrument of appropriation was filed herein, and considering such strip of land as subject to the public easement of the highway thereover known as the Wheeling pike, together with just and fair compensation for any injury to the residue of the plaintiff's land from which such strip was taken, naturally resulting from the appropriation of the easement described in the instrument of appropriation. (2) In estimating the damages which you will award in favor of the plaintiff, you have no right to consider any injuries which might result to plaintiff from any negligence or unskilfulness of the defendant in the operation and maintenance of its pipe-lines over the strip of land sought to be appropriated therein, since the plaintiff would have the same right to sue for and recover damages for such negligence or unskilfulness as would any other person injured thereby." These instructions correctly state the law, and were applicable to the evidence. *Lafayette, etc., R. Co. v. Murdock*, 68 Ind. 137; *Logansport, etc., R. Co. v. Buchanan*, 52 Ind. 163; *Chicago, etc., R. Co. v. Hunter*, 128 Ind. 213; *Manufacturers Nat. Gas Co. v. Leslie*, 22 Ind. App. 677; Lewis, *Eminent Domain* (2d ed.), §482.

But the instructions given by the court to the jury were a full and complete statement of the law applicable to the issues and evidence in this case, and covered every point mentioned in the refused instructions. The jury was instructed that the assessment of damages must relate "to the time of the condemnation," and this is equivalent to

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saying that the assessment of damages must relate to the time of the filing of the instrument of appropriation. The jury were, in effect, repeatedly instructed that no damages could be considered, growing out of the negligence or unskilfulness of appellant in the operation and maintenance of its pipe-line over the strip of land sought to be appropriated, and were further instructed that in deliberating on the verdict they must presume that the appellant would construct, operate, and maintain its pipe-line in conformity to law. The instructions asked by appellant were properly refused.

Counsel do not argue the other questions raised in the statement of points and authorities.

We are convinced that there was no error in the admission or refusal of evidence, and that the trial court properly overruled the motion for a new trial. Judgment affirmed.

BLACK ET AL. v. MARSH.

[No. 4,228. Filed April 24, 1903.]

TRIAL.—Joint Tort Feasors.—Separate Trials.—Where action is commenced against two persons as joint tort-feasors, the defendants are not entitled to separate trials, although the plaintiff might have elected to sue the defendants separately. *p. 54.*

FALSE IMPRISONMENT.—Procuring Arrest.—Question of Fact.—In an action for false imprisonment, the question as to whether the defendant procured and directed an unlawful arrest is a question of fact. *p. 55.*

TRIAL.—Evidence.—Instruction.—Where, in the trial of an action against two defendants, a deposition is read which is not competent evidence against one of the defendants, such defendant has a right to an instruction limiting the deposition to the party against whom it is competent. *pp. 55, 56.*

EVIDENCE.—Deposition Taken Without Notice.—A deposition objected to by one not present when it was taken, and to whom no notice has been given of the intention to take it, is not competent evidence against him. *pp. 55, 56.*

SAME.—Deposition taken Without Notice.—The fact that a party not present at the taking of a deposition, and who had no notice thereof might have introduced it in evidence against those who

were parties to it does not affect his right to object to its introduction by them against him. *pp. 56, 57.*

DEPOSITIONS.—*Taken by One of Two Defendants.*—One of two defendants can not take depositions by service of a notice upon the sole plaintiff, and thereby bind his codefendant. *pp. 56, 57.*

EVIDENCE.—*Depositions.*—The evidence delivered by depositions, like other evidence, must be scrutinized, excluded and limited by the court in accordance with the rights of the parties. *p. 57.*

FALSE IMPRISONMENT.—*Burden of Proof.*—*Presumption.*—In an action for false imprisonment, the fact that the plaintiff was imprisoned is sufficient to raise the presumption that such imprisonment was illegal, and the burden of establishing the contrary is on the defendant. *p. 57.*

From Putnam Circuit Court; *P. O. Colliver*, Judge.

Action by Frank N. Marsh against George W. Black and another. From a judgment for plaintiff against Black, the latter appeals. *Reversed.*

T. T. Moore and *G. C. Moore*, for appellants.

J. J. Smiley and *C. B. McNay*, for appellee.

ROBY, C. J.—This action was begun by the appellee against Richard M. Bunten and George W. Black to recover damages for false imprisonment. Upon a verdict against Black, assessing damages at \$500, and in favor of Bunten, judgment was rendered, from which Black appeals.

The first error assigned is that the complaint does not state facts sufficient to constitute a cause of action. The second assignment is that the court erred in overruling appellant's demurrer to the complaint. No objection to the sufficiency of the complaint has been pointed out, and none is known.

The third assignment is that the court erred in overruling appellant's motion for a separate trial. The suit was brought against two persons as joint tort-feasors. The appellant might have elected to sue one of them without joining the other. *Hoosier Stone Co. v. McCain*, 133 Ind. 231. Having joined them, he was entitled to a trial of the issue and judgment in accordance with the proof made. §577

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Burns 1901. No error was committed in overruling the motion.

The fourth assignment is that the court erred in overruling appellant's motion for a new trial. Numerous grounds for a new trial were stated in the motion, among them that the court erred in admitting, over the objection of appellant, and as evidence against him, the deposition of S. W. Renner, and that it erred in refusing to instruct the jury that such evidence should not be considered as against appellant.

The evidence in the case discloses that Bunten was the sheriff of the county; that he arrested the appellee, and confined him in the county jail, without warrant or reason, except a suspicion, communicated to him by his codefendant, the appellant, that appellee was a horse thief. There does not seem to have been any apparent ground for the suspicion, which was, in fact, wholly without foundation. Acting upon it, however, Bunten arrested appellee, imprisoned him in the county jail from Saturday noon until the following Monday at half past four in the afternoon. The evidence was ample to sustain a verdict against Bunten, but the jury found in his favor. The verdict against appellant was procured upon the theory that he improperly induced the officer to make the arrest without warrant, and without any offense having been committed. *Veneman v. Jones*, 118 Ind. 41, 45, 10 Am. St. 100.

Whether appellant procured and directed the unlawful arrest was a question of fact. *Carson v. Dessau*, 142 N. Y. 445; *Cunningham v. Seattle Electric R., etc., Co.*, 3 Wash. 471, 28 Pac. 745; *Pearce v. Needham*, 37 Ill. App. 90. Upon this question the evidence was conflicting. Appellant's testimony tended to exonerate him from responsibility. Upon the other hand, there was evidence sufficient to support the verdict against him.

The deposition of the witness Renner was taken on the behalf of Bunten. Notice was given to appellee. No notice

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was given to appellant, and he was not present in person nor by attorney at the taking of the deposition. Renner's testimony related principally to a conversation between Bunten and appellant prior to the detention and imprisonment of appellee, and relative thereto, and tended to show that appellant procured and directed the arrest. Objection was made to the admission of the deposition as against him when it was offered in evidence. The objection was overruled, and an exception reserved. Appellant at the proper time asked that the jury be instructed "that the deposition of S. W. Renner, read in evidence by the defendant Bunten in his own behalf, can not be considered by the jury as against defendant Black, or as evidence against him in said cause." The court refused to give the instruction, and the evidence was not in any way limited. If it was not competent against appellant, he had the right to an instruction limiting it to the parties against whom it was competent. *Thistlewaite v. Thistlewaite*, 132 Ind. 355, 357. The tendency of the evidence was to establish a liability on the part of the appellant to the appellee. Had appellant desired to avail himself of the deposition as against the parties taking it, he might have done so; but a deposition objected to by one not present when it was taken, and to whom no notice has been given of the intention to take it, is not competent evidence against him, and the court should so have instructed the jury. *Lumpkin v. Minor* (Tex. Civ. App.), 46 S. W. 66; *Zerkel v. Wooldridge* (Tex. Civ. App.), 36 S. W. 499.

Section 423 Burns 1901 authorizes the taking of depositions upon notice "to the adverse party, if there be only one person; if there be several, to any one of them who is a real party in interest." The deposition in question was not taken by or in behalf of the appellant, and did not purport to be so taken. He was a stranger to it. That he might have introduced it in evidence as against those who were parties to it does not affect his right to object

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to its introduction by them against him. The absence of the facts which would make it competent in one case, will in the other sustain the objection. The statute cited is not, however, applicable. The legislature has not said that one of two defendants may take depositions by the service of a notice upon the sole plaintiff and thereby bind the codefendant. Even if appellant were an adverse party to the person taking a deposition, he would not be within the meaning of the section cited. The legislature might as well provide that service of summons upon one of two defendants jointly sued should be sufficient to justify a judgment against both as that notice to take a deposition served upon one party shall render the deposition binding upon the one not served or represented. It has not intended or attempted to do either. A deposition taken in pursuance of a notice served upon one of several parties can not be wholly excluded because of the notice not having been served upon all. The evidence delivered by deposition, like other evidence, must be scrutinized, excluded, and limited by the court in accordance with the rights of the parties. The error is of such a nature as to require a reversal of the judgment.

The court instructed the jury to the effect that the fact that the appellee was imprisoned was sufficient to raise the presumption that such imprisonment was illegal, and that the burden of establishing the contrary was upon defendants. There was no error in this instruction. "Whoever assaults or imprisons another must justify himself by showing specially to the court that the act was lawful." 1 Chitty, Pleading, 501, quoted and approved in *Gallimore v. Ammerman*, 39 Ind. 323. *Carey v. Sheets*, 60 Ind. 17, 21.

Judgment reversed, and cause remanded, with instruction to sustain appellant's motion for a new trial and for further proceedings.

Helberg v. Hammond Bldg., etc., Assn.

HELBERG v. HAMMOND BUILDING, LOAN &
SAVINGS ASSOCIATION.

[No. 4,404. Filed April 24, 1903.]

NEW TRIAL.—*Causes.*—*Overruling Demurrer.*—The action of the court in overruling a demurrer to the complaint can not properly be made a cause in a motion for a new trial. *p. 58.*

APPEAL AND ERROR.—*Overruling Demurrer to Complaint.*—*New Trial.*—The ruling of the court on demurrer to a complaint can not be presented on appeal under an assignment thereof in a motion for a new trial. *p. 58.*

From Lake Superior Court; *H. B. Tuthill*, Judge.

Action by the Hammond Building, Loan & Savings Association against George H. Helberg. From a judgment for plaintiff, defendant appeals. *Affirmed.*

V. S. Reiter and *W. S. Coy*, for appellant.

Lawrence Becker, for appellee.

BLACK, P. J.—The overruling of appellant's motion for a new trial is alone assigned as error. One of the causes stated in the motion was that the court erred in overruling the appellant's demurrer to the appellee's complaint, and the discussion of counsel is confined to the question as to the sufficiency of the complaint. The action of the court in overruling the demurrer could not properly be made a cause in the motion for a new trial, and the ruling on demurrer can not be presented for the consideration of this court under such an assignment of error.

Judgment affirmed.

Angell v. Hornbeck.

ANGELL v. HORNBECK ET AL.

[No. 4,848. Filed April 28, 1903.]

HIGHWAYS.—Establishment.—Public Utility.—In a proceeding to establish a public highway, existing highways, the location of markets with relation to the residences of the inhabitants, the character of the soil, the location of schoolhouses, churches, graveyards, and the condition of other highways already in use are proper subjects of inquiry in determining the utility of the proposed highway. pp. 60, 61.

SAME.—Establishment.—Remonstrator.—Measure of Damages.—Instruction.—An instruction in a proceeding to establish a public highway that “the benefits accruing to the landowner remonstrating, if there are any such benefits proved by the evidence, should be considered in connection with all the other evidence in the case, and, upon all the facts and circumstances in evidence, you will determine what amount, if any, the remonstrator has been damaged” was erroneous, since it was proper for the jury to consider only such evidence as was properly admitted upon the issue of benefits and damages in estimating remonstrator’s damages. pp. 61, 63.

From Carroll Circuit Court; *T. F. Palmer*, Judge.

Proceeding by Charles A. Hornbeck and others for the establishment of a public highway in which Eliza V. Angell and others remonstrated. From a judgment of the circuit court establishing the highway, Eliza V. Angell appeals. *Reversed.*

L. D. Boyd and *F. R. Pixler*, for appellant.

W. C. Smith and *G. W. Julien*, for appellees.

HENLEY, J.—This was an action commenced in the commissioner’s court of Carroll county for the location of a public highway. Charles Hornbeck et al., who are named as appellees, were the petitioners. The appellant appeared in the commissioner’s court, and filed a remonstrance, claiming damages. Afterward, appellant with some other parties who did not join with her in the appeal to the circuit court, filed a remonstrance in which they denied that the proposed road would be of public utility. The review-

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ers appointed upon appellant's remonstrance found, in favor of the petitioners, that the road would be of public utility, and the board of commissioners of said county thereupon ordered the road established.

Appellant alone appealed to the Carroll Circuit Court. In the circuit court of Carroll county the question presented by the petition, report of viewers, and remonstrance, was submitted to the jury, which returned a verdict that the proposed highway would be of public utility, and assessing appellant's damages in the sum of \$100. Appellant filed a motion for a *venire de novo*, which was overruled. Thereupon appellant moved for a new trial, which motion was overruled, and judgment rendered on the verdict.

The two specifications of error assigned in this court are: (1) That the trial court erred in overruling appellant's motion for a *venire de novo*; and (2) that the trial court erred in overruling appellant's motion for a new trial.

This court is asked, first, to determine as to the sufficiency of the evidence to support the verdict. There were two issues presented to the jury for determination under the pleadings filed. The first of these was whether or not the proposed highway would be of public utility. The second was as to the damages sustained by the appellant. Counsel for appellant contend that there was no evidence to show the location of the highway. In this they are mistaken. The evidence of the witness Hornbeck was clearly sufficient upon the question of location; and upon the question of public utility, which counsel for appellant contend was not supported by any evidence, we find an abundance of evidence which, under the authorities, would tend to prove that the proposed highway would be of public utility. There were witnesses who testified concerning the existing highways, the location of markets with relation to the residences of the inhabitants, the character of the soil, the location of schoolhouses, churches, graveyards, and the condi-

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tion of other highways already in use, all of which would go to establish the utility or non-utility of the proposed highway. In *Opp v. Timmons*, 149 Ind. 236, the Supreme Court, by Hackney, J., say: "Existing ways, the condition of population, location of markets, character of the soil, physical features of the locality, etc., are proper subjects of inquiry in determining the utility of a highway." There was sufficient evidence to support the verdict.

It is next contended by counsel for appellant that the trial court erred in giving to the jury instruction number three. Instruction three was as follows: "In considering the question of damages, you are instructed that the taking of private property for use as a public road without making compensation therefor is not permitted by law, yet such compensation need not be made in money. The benefits accruing to the landowner remonstrating, if there are such benefits from the establishment of the proposed highway, proved by the evidence, should be considered in connection with all the other evidence in the case; and upon all the facts and circumstances in evidence you will determine what amount, if any, the remonstrator Eliza V. Angell has been damaged by reason of the facts alleged in her remonstrance. After making proper allowance for benefits, if any, accruing to her from the establishment of the highway, and upon all the facts and circumstances proved under the law, she should be allowed such damages as may have been so proved, if any, that she will suffer by reason of the establishment of the proposed highway, if you find that such proposed highway would be, if established, of public utility. In estimating such damages, it is only proper to consider the purposes for which the land is being used at the time of the location of the highway, and not what use the owner may make of the same at some future period. The element of damages may be not only the value of the land actually to be taken for the highway, but may be the additional expense, if any, the landowner

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may be put to in adjusting his land to the purposes for which it is used. If the location of the highway would require the landowner to remove existing fences or to build and maintain new fences, the cost of the removal of old fences, or the building and maintaining of new ones, may be considered in estimating the damages of the landowner who remonstrates; but the value of the material in old fence moved from the line of the highway to the side, so as to form a fence at the side of the highway, can not be allowed as damages."

That part of the instruction by which the jury were informed that "the benefits accruing to the landowner remonstrating, if there are any such benefits proved by the evidence, should be considered in connection with all the other evidence in the case; and upon all the facts and circumstances in evidence you will determine what amount, if any, the remonstrator Eliza V. Angell has been damaged by reason of the fact alleged in her remonstrance, after making proper allowance for benefits"—we think radically wrong, and calculated to prejudice appellant's cause with the jury. By this instruction the jury were told to consider all the evidence in determining the benefits that would accrue to appellant by the opening of the proposed highway. The jury ought to have been instructed upon the issue of damages and benefits, to consider only such evidence as was properly admitted upon that issue. Evidence which was introduced to show that the proposed road would be of public utility could not properly be considered by the jury in placing an estimate upon appellant's individual benefits. There was evidence, admitted over the objection of appellant, upon the question of utility, which, in its nature, would have a tendency to prejudice the minds of the jury against her. It was the duty of the court, as was well said in *City of Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98, to instruct the jury that, "where there are facts given in evidence which ought not be considered

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in estimating damages, the instructions of the court should inform the jury what facts should be considered by them in making the estimate, and not leave it to them to take into account facts which have no legitimate bearing upon this branch of the case." The authorities are agreed that where facts are given in evidence upon two issues, as in this case, the instructions of the court when instructing on any one issue should confine the jury to the matter as presented in said issue on which the instruction was given. See, also, Elliott, Roads & Sts. (2d ed.), §246; *Vanblaricum v. State*, 7 Blackf. 209; *Burk v. Simonson*, 104 Ind. 173, 54 Am. Rep. 304. We think the trial court committed reversible error in so instructing the jury.

Judgment reversed, and cause remanded, with directions to the trial court to grant appellant's motion for a new trial.

MCCARDLE ET AL. v. THE AULTMAN COMPANY.

[No. 4,220. Filed April 28, 1903.]

JUDGMENTS.—*Title.*—*Corporations.*—*Receivers.*—A complaint in a suit on a judgment alleging that the judgment was rendered in favor of an Ohio corporation, and that thereafter said corporation went into the hands of a receiver and the receiver was ordered by the court to turn over to a commissioner, who was ordered to sell the same, all of the property of the corporation; that the property was transferred and sold as directed, and afterward sold and transferred by the purchaser to plaintiff, shows that plaintiff was the owner of the equitable title to the judgment, and as such owner it had the right to sue on the judgment. pp. 64, 65.

SAME.—*Equitable Ownership.*—*Enforcement.*—*Parties.*—Where the owner of the equitable title to a judgment rendered in favor of an insolvent corporation brought suit to enforce such judgment, it was necessary, in order to bind the legal title, that the said corporation, its assignees, and receivers, be made parties. p. 65.

SAME.—*Equitable Ownership.*—*Enforcement.*—*Evidence.*—*Directing Verdict.*—Where, in an action on a judgment by the assignee thereof, the plaintiff introduced in evidence the original judgment and the equitable assignment thereof to plaintiff, and no evidence was introduced in defense, it was proper to direct a verdict for plaintiff. p. 66.

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From Ohio Circuit Court; *N. S. Givan*, Judge.

Action by the Aultman Company against Nathan McCardle and others. From a judgment for plaintiff, defendants appeal. *Affirmed.*

J. B. Coles and *Cynthia Coles*, for appellants.

S. H. Stewart, *A. C. Ayers*, *A. Q. Jones* and *J. E. Hollett*, for appellee.

ROBY, C. J.—The Aultman Company, an Ohio corporation, sued the appellant Nathan McCardle upon a judgment alleged to have been rendered against him on January 17, 1884, in the Ohio Circuit Court, in favor of C. Aultman & Co., and to remain due and unpaid. It is further averred that in December, 1893, in a suit against C. Aultman & Co., brought in the court of common pleas of Stark county, Ohio, defendant Lynch was appointed receiver for C. Aultman & Co.; that afterwards, appellant Doll was appointed a special commissioner, and the receiver and C. Aultman & Co. were ordered to turn over, transfer, and deliver to said commissioner, and the commissioner was ordered to sell the real estate, personal property, and all bills, choses in actions, claims, debts, dues, and demands, held by and owing to C. Aultman & Co., or in the hands of the receiver, or to which either was entitled; that on February 16, 1895, the commissioner sold all of said property to William W. Clark, and on February 26, pursuant to an order of court, the commissioner did assign and transfer all of said property to said Clark; that the judgment sued on in this action was not assigned in the record, and was not specially mentioned, but was included in the sale and transfer to Clark; that afterward Clark sold and transferred all the property purchased from the commissioner, including the judgment sued on, to the Aultman Co. It is also alleged that appellee is the absolute and equitable owner of the judgment; that appellants, Lynch, receiver, Doll, commissioner, Keeney, receiver, and C. Ault-

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man & Co., have no interest therein; that Keeney, as receiver of C. Aultman & Co., was claiming some right to collect the judgment, and was made a party for that reason. Defendants, C. Aultman & Co., Lynch, and Doll, appeared to the action, and disclaimed interest in the judgment sued upon. Keeney filed an affirmative answer setting up his appointment by the Marion Circuit Court as receiver of and for the property of C. Aultman & Co. in Indiana. Reply in denial was made thereto. Appellant McCardle demurred to the amended complaint: (1) For want of facts; (2) because the plaintiff had no legal capacity to sue. Demurrer overruled. Appellant McCardle's motion to strike out the answer of C. Aultman & Co. overruled. Trial by jury. Verdict for plaintiff. Motions for new trial and in arrest of judgment overruled. Judgment on verdict. Exceptions by McCardle to each adverse ruling.

The errors assigned and not waived are that the court erred in overruling the demurrer to the amended complaint, motion to strike out the answer of C. Aultman & Co., and motion for a new trial.

The facts stated in the amended complaint were sufficient to show that appellee was the owner of the equitable title to, and, as such owner, had a right to sue upon, the judgment. *Wood v. Wallace*, 24 Ind. 226; *Kelley v. Love*, 35 Ind. 106; *Shirts v. Irons*, 54 Ind. 13; *Adams v. Lee*, 82 Ind. 587, 589; *Snell v. Maddux*, 20 Ind. App. 169.

The judgment having originally been rendered in favor of C. Aultman & Co., they held the legal title when the present action was instituted; and it was necessary, to bind that title, that the said company, its assignees and receivers, be made parties. *Nelson v. Johnson*, 18 Ind. 329, 333; *Chicago, etc., R. Co. v. Higgins*, 150 Ind. 329; *Carskadon v. Pine*, 154 Ind. 410.

The complaint, alleging the recovery of the judgment in the Ohio Circuit Court, the equitable assignment thereof

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to appellee, that the judgment remained due and unpaid, and the holder of the legal title and its assignees and receivers being made parties thereto, was sufficient to withstand the demurrer of the person against whom the judgment was originally rendered, and it was not error for the court so to hold. Neither did the court err in overruling the motion for a new trial.

Appellee, to sustain the allegations of its complaint, introduced the judgment recovered by C. Aultman & Co. against McCardle, of record in the Ohio Circuit Court, the deed and transfer of Doll, commissioner, to Clark, and the transfer of Clark to appellee. No evidence was introduced by appellants. The court instructed the jury that, under this evidence, appellee was entitled to recover the amount of the judgment, with six per cent. interest thereon to the time of the trial. There was no dispute about the evidence, and it was sufficient to sustain the material allegations of the complaint. No defense was made or attempted. Under such circumstances the instruction was properly given. *Hazzard v. Citizens State Bank*, 72 Ind. 130, and cases cited; *Moore v. Baker*, 4 Ind. App. 115, 117, 51 Am. St. 203.

Neither did the court err in refusing to give instructions requested by appellant. They were not applicable to the evidence. Neither did the court err in refusing to strike out the answer of C. Aultman & Co. Appellant was not injured thereby. His interest could not in any way be prejudiced by such ruling. One payment of the judgment will release him from all liability to anyone. A correct result was reached. *Wortman v. Minich*, 28 Ind. App. 31.

Judgment affirmed.

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**GOELZ, EXECUTRIX, v. PEOPLE'S SAVINGS BANK
ET AL.**

[No. 4,400. Filed April 29, 1903.]

GIFTS.—*Delivery.—Acceptance.—Evidence.—Bank Deposit.*—Decedent executed a will, by the terms of which she gave \$5 to her son, and all the residue of her property to her three daughters. Thereafter she deposited in a bank, for and in the name of the son, \$900, which was placed to his credit on the books of the bank, and a pass-book issued in the name of the son, which was given to decedent and kept by her until her death. About a year after the deposit was made, decedent sent to her son, by mail, a written order for him to sign, authorizing the payment of the money so deposited, on the receipt of either of them, which he returned without signing. After the death of decedent, the son's wife brought suit against him for support, and made the bank a party, asking that the money on deposit be applied toward her support, to which action he appeared and defended. *Held*, that the facts sufficiently show that decedent parted with possession of the money, a delivery thereof to a third person in trust for the son, and such an exercise of dominion over it by the son as to amount to an acceptance, to constitute a valid gift *inter vivos*.

From the Superior Court of Vanderburgh County; *J. H. Foster*, Judge.

Action by Mary A. Goelz, executrix of the last will of Mary A. Long, deceased, against the People's Savings Bank, in which Katharine Long and Joseph Bastian were, upon petition, made defendants. From a judgment for defendants, plaintiff appeals. *Affirmed*.

W. W. Ireland and *William Reister*, for appellant.

J. T. Walker and *D. Q. Chappell*, for appellees.

WILEY, J.—Appellant, as executrix, brought her action to recover a sum of money which had been deposited in the People's Savings Bank by the decedent, which she alleged was a part of the assets of the estate. In the first instance the bank was the only defendant, and subsequently appellees, Bastian and Katherine Long, filed a petition asking

to be made defendants, which petition was granted. Appellant thereupon filed an amended complaint, upon which issues were joined. Trial by the court, finding and judgment for appellees.

By the assignment, the action of the trial court in overruling appellant's motion for a new trial is brought into review. The only question raised by the motion for a new trial is that the decision is not sustained by sufficient evidence and is contrary to law.

The correctness of the ruling on the motion for a new trial must be determined upon the following statement of facts as disclosed by the record: For some years prior to her death, Maria A. Long, the decedent, had been a widow. She had four children, consisting of one son and three daughters, all of whom survived her. One of the daughters became executrix of her will. The deceased was possessed of a goodly estate, composed of both real and personal property. All of her children, excepting her son Louis, lived in Evansville, where she had for many years made her home. Louis had been a nonresident of the State for more than twenty years.

The inventory of decedent's estate showed that she possessed personal property of the value of \$3,635.75. In 1875 Louis Long married the appellee, Katherine Long. They had born to them one child, named Josie, who is now grown and married. In 1876, without any just cause, so far as the record shows, Louis Long abandoned his wife and child, and thereafter never contributed anything to their support. During the twenty years he occasionally visited Evansville, but never visited his wife or child. During all this time his wife, by her own labor, supported herself and daughter, until in recent years she became dependent upon others. All these facts were known to the decedent. In 1893 the decedent executed a will, by the terms of which she gave \$5 to her son Louis, and all the residue of her estate to her three daughters. The evidence

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does not show that she ever made an advancement to her son. At or about the time decedent made her will, Louis visited her at her home. January 4, 1898, the decedent deposited in the People's Savings Bank of Evansville, Indiana, for and in the name of her son Louis Long, \$900, which was placed to his credit on the books of the bank. At the time of the deposit the bank issued a pass-book in the name of Louis, showing that said sum of money had been deposited in his name and to his credit. The pass-book was given to the decedent, who took it home with her, and kept it in her possession until her death. About a year after the deposit was made, the decedent sent to Louis, by mail, to Nashville, Tennessee, a written order for him to sign, authorizing the payment of any money deposited in the name of either of them or both of them in said bank, to be paid upon the receipt of either of them. He received said order, and returned it to his mother without signing it. The pass-book came into the possession of appellant upon the death of her mother, and the money so deposited was not included in the inventory she filed as a part of the assets of the estate, and no account of it was taken by her. After the death of the decedent, Katherine Long, wife of Louis, commenced an action against her husband for support and maintenance, and made appellee bank a party. She averred that the bank had on deposit, to the credit of Louis, said money, and asked to have it applied toward her support. The bank, in that action, answered, admitting that it had the sum of \$979.10, which included accrued interest, on deposit to the credit of said Louis, and that it had no interest in the controversy between Katherine and Louis further than that its rights be protected. At or about the time of the commencement of this suit the pass-book above referred to was delivered to Louis, and he employed counsel to appear for him in that action and protect his interests. Such proceedings were had in that action as upon trial by the court there was a finding that

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the money so deposited was the money of Louis Long, and belonged to him, and that the same should be applied to the support and maintenance of Katherine. To carry out the order of the court, appellee Bastian was appointed receiver, and by order of the circuit court, in which the case was tried, the money so deposited was ordered to be paid to the receiver, which was done.

The daughter of Louis Long testified that he told her that his mother had given him money, or deposited it for him. The evidence is uncontradicted that the decedent deposited the \$900 in bank as a gift to her son. She talked to a number of her neighbors about it, and told all of them what she had done. One witness testified that, just after the decedent had returned from a visit to her son, she told him she had been to the bank and deposited money for him. The same witness testified that Louis Long told him that "if anything happened he had money here [Evansville] in bank." Notwithstanding the fact that Louis testified that he did not know that his mother had deposited money to his credit in the bank, there is an abundance of evidence for the trial court to have reached the conclusion that he did know it. When asked to sign an order so that any money deposited in the name of his mother or himself might be paid out on the receipt of either of them, and refusing to sign it, is strong evidence that he knew that the money had been deposited for him, and, in refusing to sign the order, he thereby exercised dominion over it, and recognized it as his own. There is no question but what, after his mother's death, he attempted to exercise dominion over it, for he employed counsel in a pending suit to which he was a party, wherein was involved the question of his title and right to the money, to protect his interest therein.

Counsel for appellant urge that the mere fact of the decedent depositing the money in bank to the credit of her son was not a gift *inter vivos*, because the requisites to constitute such gift were wanting.

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The requisites of a valid gift *inter vivos* are that there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect at once, and fully executed by a delivery of the property by the donor and an acceptance thereof by the donee. 14 Am. & Eng. Ency. Law (2d ed.), 1015; *Smith v. Dorsey*, 38 Ind. 451, 10 Am. Rep. 118; *Daubenspeck v. Biggs*, 71 Ind. 255; *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; *Bingham v. Stage*, 123 Ind. 281; *Mercantile Safe Deposit Co. v. Huntington*, 89 Hun 465, 35 N. Y. Supp. 390; *Cambreng v. Graham*, 79 Hun 247, 29 N. Y. Supp. 419; *Telford v. Patton*, 114 Ill. 611; *Williamson v. Johnson*, 62 Vt. 378, 20 Atl. 279, 9 L. R. A. 277, 22 Am. St. 117.

It must appear that the donor parted with the possession of the thing or article, in order that the donee should receive it, to constitute a delivery. *Buschian v. Hughart*, 28 Ind. 449.

Under the facts disclosed by the record, there is no doubt but what the decedent parted with the possession of the money deposited to the credit of her son. She evinced her intention in making the deposit by stating to her neighbors and friends that she had given the money to her son. That it was gratuitous and absolute on her part there can be no doubt. By making the deposit in the name of and to the credit of her son she lost dominion over it, and was powerless to withdraw it by check or otherwise. When a gift has become executed or consummated, and has passed from the control of the donor, it can only be revoked by the consent of the parties. *Pruitt v. Pruitt*, 91 Ind. 595; *Richards v. Reeves*, 149 Ind. 427.

It would seem from the facts disclosed by the record, that the donor made some attempt to revoke the gift, in part at least, but failed, because the donee would not consent to such revocation. The fact that the donor made no further effort to revoke it strongly tends to prove that she

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recognized the gift as fully consummated. The repeated declarations of the decedent that she had made the gift strengthens the proposition.

It remains to determine whether the other requisites were present; that is, whether there was a delivery to, and an acceptance by, the donee. The fact that the decedent made the gift just after she had returned from a visit to her son may properly be considered in this connection. While there must be a delivery and acceptance to complete the gift, it does not necessarily follow that the delivery must be made directly to the donee, and, under certain conditions, acceptance will be presumed. The delivery may be made to the donee or some one for him. This rule prevails in England, and in most, if not all, states of the Union. It would take too much space to cite all the authorities in support of this proposition, and we merely cite 14 Am. & Eng. Ency. Law (2d ed.), 1017, 1018, and cases cited.

In this case the delivery was not made directly to the donee, and, if there was a delivery, it was to a third person for him. Where a delivery is thus made to a third person, the question whether the gift was thereby completed without actual delivery to the donee depends entirely upon whether the person to whom the property is delivered receives it as the donor's agent or as trustee for the donee. If, in this case, the delivery was made to the bank as the agent of the donor, the agent's authority to make delivery was revoked by the death of the donor, for the agency could not continue after the death of the principal. The delivery of the property to a third person as trustee for the donee, and not as an agent of the donor, where the latter relinquishes all dominion of the property to the trustee, is a sufficient delivery to complete the gift, which, in such case, is not revoked by the subsequent death of the donor before the property has been actually delivered to the donee. 14 Am. & Eng. Ency. Law (2d ed.), 1025, 1026; *Easly*

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v. *Dye*, 14 Ala. 158; *Rinker v. Rinker*, 20 Ind. 185; *Miller v. Billingsley*, 41 Ind. 489; *Wyble v. McPheters*, 52 Ind. 393; *Martin v. McCollough*, 136 Ind. 331; *Telford v. Patton*, 144 Ill. 611; *Seavey v. Seavey*, 30 Ill. App. 625; *Ross' Appeal*, 127 Pa. St. 4, 17 Atl. 682; *Dresser v. Dresser*, 46 Me. 48; *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231; *Davis v. Ney*, 125 Mass. 590, 28 Am. Rep. 272; *Hamilton v. Armstrong*, 120 Mo. 597, 25 S. W. 545; *Hagerman v. Wigent*, 108 Mich. 192, 65 N. W. 756; *Bump v. Pratt*, 84 Hun 201, 32 N. Y. Supp. 538; *Marshall v. Russell*, 93 Tenn. 261, 25 S. W. 1070; *Blanchard v. Sheldon*, 43 Vt. 512; *Second Nat. Bank v. Merrill*, 81 Wis. 142, 50 N. W. 503, 29 Am. St. 870.

In the case of *Devol v. Dye*, 123 Ind. 321, 7 L. R. A. 439, where a decedent, three days before his death, declared to the cashier of a bank, wherein he had a tin box, that it had always been his intention to give to a designated person \$5,000, and that he had put \$2,000 in gold in the box in a bag, and marked the name of the intended donee thereon, and directed the cashier to go to the bank and count out \$3,000 more in gold coin, and put in a sack and mark it as the other, and to put \$1,000 in currency in an envelope for another designated person, and put her name upon it, and then directed that in case of his death the cashier deliver the sacks and the envelope to the parties so designated, it was held that such facts constituted a delivery to the donees, as gifts *causa mortis*.

In *Caylor v. Caylor's Estate*, 22 Ind. App. 666, 72 Am. St. 331, where a married woman, shortly before her death, called for her nephew and was informed that he was absent, whereupon she told her husband that she then gave to her nephew all of her property which was then in the possession of her husband, and directed him to deliver it to the nephew, it was held that such facts showed a gift *causa mortis*. In the last-cited case, many of the leading authorities are collected, which support the proposition that a

delivery to a third person, for the benefit of a donee, is sufficient delivery to the latter, even though actual delivery does not precede the death of the donor. We refer to the opinion in that case, and the cases there cited, without further comment. This disposes of every question except that of acceptance.

From all the evidence in the case, and from all reasonable inferences from the facts which the trial court was authorized to draw, it sufficiently appears that Louis Long accepted the gift from his mother. The deposit was made, accompanied by repeated assertions that she had deposited the money to his credit and that she intended it as a gift, immediately or soon after she had visited him. He told his daughter that his mother had given him money, and he exercised dominion over it by refusing to permit it to be drawn from the bank by his mother. He also attempted, in a case where he was a party, and in which his right and title to the money were directly involved, to protect his interests. In such case the exercise of dominion over the subject of the gift, or an assertion of a right thereto by the donee, is evidence of an acceptance by him of the gift. *Love v. Francis*, 63 Mich. 181, 29 N. W. 843, 6 Am. St. 290. See, also, *Williams v. Smith* 66 Ark. 299, 50 S. W. 513. But if it be conceded, which is not, that he did not signify his acceptance by act, word, or deed, it does not follow that there was not, in law, an acceptance by him. The rule that requires acceptance to complete a gift rests largely upon the very reasonable ground that the donee may not desire to have the property intended as a gift, for the reason that there may be burdens growing out of its ownership which he does not desire to assume, and the law will not enforce a gift against his will. 14 Am. & Eng. Ency. Law (2d ed.), 1027, and authorities there cited. But the rule prevails that where the gift is entirely beneficial to the donee, his acceptance of it will ordinarily be presumed, unless the contrary appears. *DeLevillain v.*

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Evans, 39 Cal. 120; *Holmes v. McDonald*, 119 Mich. 563, 78 N. W. 647, 75 Am. St. 430; *Green v. Langdon*, 28 Mich. 221; *Dunlap v. Dunlap*, 94 Mich. 11, 53 N. W. 788; *Love v. Francis*, *supra*; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Tygard v. McComb*, 54 Mo. App. 85; *Blasdel v. Locke*, 52 N. H. 238; *Frazier v. Perkins*, 62 N. H. 69; *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. 531; *Matson v. Abbey*, 70 Hun 475, 24 N. Y. Supp. 284; *Goss v. Singleton*, 2 Head (Tenn.) 67; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 Am. Rep. 781. Thus, where a gift is made to a minor, who, in law, is presumed to be incapable of exercising a sound discretion over his affairs, if the gift is for his advantage, the law will accept it for him. *DeLevillain v. Evans*, *supra*; *Francis v. New York, etc., R. Co.*, 17 Abb. N. Cas. 1; *Richards v. Reeves*, 149 Ind. 427; *Tygard v. McComb*, *supra*; *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. 113. Other illustrations might be given, but it is not necessary.

It has been held that where the donor has done all in his power to complete a gift by relinquishing possession and control of the property to a third person as trustee for the donee, the gift will ordinarily be upheld, although the donee had no knowledge of the transaction. In such case the act of the trustee in receiving the property amounts to an acceptance by him on behalf of the donee. *Davis v. Ney*, 125 Mass. 590, 28 Am. Rep. 272; *Brabrook v. Boston, etc., Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446.

It has also been held that an exercise of domain over the subject of the gift, or an assertion of a right thereto by the donee, is an evidence of an acceptance by him of the gift. *Martin v. McCollough*, 136 Ind. 331; *Love v. Francis*, *supra*; *Hunter v. Hunter*, 19 Barb. 631.

It is urged by the appellant that the mere fact that one person deposits money in a bank to the credit of another,

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does not constitute a gift. As an abstract proposition this is a correct statement of the law, but appellant's contention is not applicable here, for it clearly appears that it was the intention of the donor to make the gift, and the other necessary requisites are present.

There is some confusion in the authorities respecting the disposition of a bank-book, showing a deposit in the name of the donee, as affecting the rights of the parties, and there is no reasonable hypothesis upon which they can be reconciled. The weight of the authorities, however, and better reason support the proposition that, where a completely executed gift of the money deposited is shown, it is immaterial that the deposit book has not been delivered to the donee, but remains in the possession of the donor. *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *Kerrigan v. Rautigan*, 43 Conn. 17; *Barker v. Frye*, 75 Me. 29; *Alger v. North End Sav. Bank*, 146 Mass. 418, 15 N. E. 916, 4 Am. St. 331; *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157, 2 N. E. 925; *Blasdel v. Locke*, 52 N. H. 238; *Smith v. Ossipee, etc., Sav. Bank*, 64 N. H. 228, 9 Atl. 792, 10 Am. St. 400; *Cunningham v. Davenport*, 74 Hun 53, 26 N. Y. Supp. 322; *Howard v. Windham County Sav. Bank*, 40 Vt. 597; *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119.

The circuit and superior courts of Vanderburgh county, upon a fair investigation of the question as to whether the facts in this case constituted a gift, adjudged that they did, and that the title to the money deposited to the credit of Louis Long vested in him. True, the former adjudication was not binding upon appellant, because she was not a party, but we refer to the fact, in connection with the statement that the result reached by the trial court is eminently correct, and in harmony with the rights and equities of the parties.

The appellant, when she took upon herself the administration of her trust as executrix, knew of the gift to her

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brother, and came into possession of the bank-book showing the deposit. She did not treat the \$900 in the bank to the credit of her brother as a part of the assets of the estate, for she failed to include it in the inventory, and thus recognized it as his. Not until it had been judicially determined as between the bank, Louis Long, and his wife, that the money did belong to Louis, and ought to be applied to the maintenance of his wife, whom he had deserted, did appellant attempt to assert any right to it in behalf of the estate.

Upon the whole record, we are of the opinion that the case was correctly decided, the rights of the parties equitably adjusted, and we do not find any reversible error. Judgment affirmed.

STATE, EX REL. GRAHAM, v. WALTERS, ADMINISTRATOR, ET AL.

[No. 4,250. Filed February 3, 1903. Rehearing denied April 2, 1903. Transfer denied April 29, 1903.]

MORTGAGES.—*Error in Recording.*—*Action Against Recorder.*—*Limitation of Actions.*—In recording a mortgage, the recorder negligently failed to copy correctly the description of the land, so that the mortgage was not notice, and was liable to be defeated in favor of any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration. More than six years thereafter, another mortgage was executed, and properly recorded, without notice on the part of the mortgagee of the prior mortgage. Neither the first mortgagee nor the recorder knew of the error in recording until after the execution of the second mortgage. *Held*, in an action against the recorder, that the statute of limitations began to run at the time the erroneous record was made, and that the action was barred by §294 Burns 1901. pp. 78-82.

SAME.—*Error in Recording.*—*Limitation of Actions.*—*Discovery of Cause of Action.*—*Suspension of Statute.*—A county recorder in recording a mortgage failed to copy correctly the description of the land, and the mortgage was thereby rendered invalid against a subsequent mortgagee. Neither the first mortgagee nor the recorder knew of the error in recording until after the execution of the second

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mortgage. *Held*, that there was no concealment within the meaning of §301 Burns 1901, so as to suspend the operation of the statute of limitations. *p. 82.*

From Cass Circuit Court; *D. H. Chase*, Judge.

Action by the State on the relation of Catherine Graham against George W. Walters, administrator of the estate of Henry Hubler, deceased, and others. From a judgment for defendants, *relatrix* appeals. *Affirmed.*

J. W. McGreevy and *G. E. Ross*, for appellant.

J. C. Nelson, *Q. A. Myers* and *D. D. Fickle*, for appellees.

BLACK, P. J.—This was an action commenced February 10, 1900, on the official bond of Henry Hubler, recorder of Cass county. The proceeding was commenced as a claim against the estate of the principal, deceased, and in the circuit court the sureties were brought in as additional defendants. December 7, 1889, one William Murphy executed his mortgage on certain land in that county to the *relatrix* to secure the payment of his promissory note for \$683.02, payable to her two years from that date. On the same day she presented the mortgage to the intestate, then county recorder, for recording; paying him the recorder's fee therefor. In recording the mortgage, the recorder negligently failed to copy correctly the description of the land, so that instead of a certain part of the northwest quarter of a specified section, as described in the mortgage, the record of the mortgage described a like part of the northeast quarter of the same section. He returned the mortgage to the *relatrix*, having indorsed thereon the time of the receipt of the mortgage for record, and the words: "Recorded in record 14, page 240," signed by him as recorder of that county. When the recorder delivered the mortgage to the person who called for it, a month or two after it was left for record, in answer to the question of that messenger as to whether it would be necessary to compare the mortgage and the record said: "No; that is all

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right." The land so mortgaged to the relatrix was again, March 2, 1896, mortgaged by Murphy to secure the payment of a note for \$1,500 to the Mortgage & Trust Company of Pennsylvania, by which this mortgage was taken without notice of the former mortgage. The second mortgage was duly recorded. In 1897 the relatrix brought suit against Murphy and said company to foreclose the first mortgage, and in that suit it was by the court decreed that the second mortgage was a prior and senior lien on the land mortgaged to the relatrix, and thereby she lost her security for her note. She caused execution to issue against Murphy, but was unable to realize anything, for the reason that he was insolvent, and had no property out of which the debt could be collected. Neither the relatrix nor the recorder knew of the error in recording until after the execution of the second mortgage. Henry Hubler, the recorder, died in 1898.

The controlling question is whether or not the action was barred by the statute of limitations, and the determination of this matter depends upon the solution of the question as to when the cause of action accrued on the recorder's official bond for the breach alleged; that is, when could the recorder first have been sued for the official error charged? Our statute (§294 Burns 1901) provides: "All actions against a sheriff, or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty," shall be commenced within five years after the cause of action has accrued, and not afterward. It was the statutory duty of the county recorder to record the mortgage for the relatrix in its order; and if not recorded in forty-five days from the execution thereof, the mortgage was liable to be defeated in favor of any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration.

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§§3350, 8007 Burns 1901; *United States Sav., etc., Co. v. Harris*, 142 Ind. 226, 237.

The misdescription of the land in the record of the mortgage rendered the recording worthless from the first. The debtor continued personally liable, and this liability became of no avail to the relatrix,—not through the error of the recorder, but by reason of the debtor's insolvency. The security of the land continued available, notwithstanding the fault in the recording, until the execution of the second mortgage, which, because of the recorder's mistake, was a superior lien, and finally exhausted the security. The damage consisting of the loss of the security was a direct result of the incorrect copying of the description of the mortgaged land in recording the mortgage. If that damage had accrued and action therefor had been commenced within the period of the statute after the recording of the mortgage, there can be no doubt that damages for the loss thereby sustained might have been recovered.

The right of the relatrix to have the recording of her mortgage done correctly, so that the record would constitute constructive notice of all her rights as mortgagee, was as absolute as the right to have the mortgage recorded. As between her and the recorder, she was under no obligation to inspect the record of her mortgage to see that it was safely correct. By presenting a mortgage in due form, proper for recording, and paying the recorder's fee, she did all that was incumbent upon her to impose the duty upon the recorder. When the mortgage was recorded so incorrectly that the record was worthless as notice, there was at once a violation of official duty on the part of the recorder, and the relatrix was at once thereby deprived of a material and valuable right. She then had a cause of action against the recorder. If she had discovered the error before any subsequent conveyance or encumbrance, and the original mortgage were then still in existence and in her possession, she might have had it recorded again, at the

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expense of the fee therefor, or, if in such case the original mortgage were lost, she perhaps might have procured a correction of the record; but in the meantime (at least, after the expiration of forty-five days from the execution of her mortgage) she would have been in the condition of a mortgagee whose mortgage, not being recorded, is liable to be cut off by intervening circumstances beyond her control. It might be difficult, in an action against the recorder, brought before the accruing of any rights of others in the land, to say what considerations, other than the loss of the fee for recording, should enter into the assessment of the amount of the damages; but it must, we think, be said that a right having been violated, and she having suffered an individual wrong, some damage must be presumed, whether susceptible of proof or not. See Cooley, Torts (2d ed.), *383.

It can not be doubted, it would seem, that a cause of action involving the essential elements of an actionable tort arose in favor of the relatrix against the recorder immediately upon the commission of the wrong of recording her mortgage incorrectly; the amount of the damage being determinable by a jury, under instructions. Such an action would not be like an action for a continuing nuisance, for which damages may be recovered from time to time as they have accrued; but it would be one in which all damages, past and future, so far as ascertainable would be recoverable.

The case before us is not governed by the principles of those wherein some act has been done, which, not being wrongful at the time, or not being wrongful then as to the plaintiff, furnishes an element of an action only after specific damage has resulted therefrom, and the right of action does not accrue until the special damage complained of has accrued. There, the damage being the gist of the action, the time runs only from

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the actual happening of the damage. Here, however, there was both wrong and injury as soon as the error had been committed. The mistake in the recording was not, as to the mortgagee, something which might rightfully be done, and which could not be regarded as a thing amiss until some damage should actually accrue therefrom; but it was in itself a thing amiss. Where damage has so accrued, further consequential damage will not give rise to a fresh cause of action. We are constrained to hold with the court below that the statute of limitations barred the action.

There has been some discussion by counsel of the law relating to the concealment of the fact of liability to an action by one party, and the discovery of the cause of action by the other (§301 Burns 1901); but the case at bar affords no occasion for the postponement of the running of the statute of limitations on the ground of concealment. The fact that a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not prevent the running of the statute, or postpone the commencement of the period of limitation, until he discovers the facts or learns of his rights thereunder. Nor does the mere silence of the person liable to the action prevent the running of the statute. To have such effect, there must be something done to prevent discovery,—something which can be said to amount to concealment. *Ware v. State, ex rel.*, 74 Ind. 181; *Schultz v. Board, etc.*, 95 Ind. 323; *Pence v. Young*, 22 Ind. App. 427; *Bower v. Thomas*, 22 Ind. App. 505.

To constitute the concealment which will postpone the operation of the statute of limitations, there must be more than mere silence or general declarations; there must be fraud in act or statement, intended to prevent knowledge of the existence of the cause of action, and operating to prevent discovery. *Jackson v. Jackson*, 149 Ind. 238.

Judgment affirmed.

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SHROYER v. CAMPBELL ET AL.

[No. 4,364. Filed April 30, 1903.]

TRIAL.—*Special Finding.—Request.—Waiver.*—It is the duty of the court to find the facts specially upon proper request, but the right to a special finding may be waived by the party requesting it after the request is made. *p. 84.*

SAME.—*Special Finding.—Request.—Waiver.*—A request for special findings will be presumed, on appeal, to have been waived, where, without any objection made or exception taken, the court made a general finding and rendered a decree thereon. *p. 84.*

JURY.—*Right to Jury Trial.—Abatement of Nuisance.—Injunction.*—A party is not entitled to a jury trial as of right in a suit to enjoin and abate a nuisance. *p. 85.*

NUISANCE.—*Evidence.—Harmless Error.*—In a suit by tenants who occupied a part of a building as storerooms against a tenant of another part of the building to enjoin and abate a nuisance consisting of a stairway which cut off light and ventilation from plaintiffs' rooms, and offensive and unhealthful odors created by defendant, there was no reversible error committed in permitting evidence to be introduced as to the rental value of the rooms occupied by plaintiffs if the premises were free from the annoyances about which complaint was made, where mere nominal damages were awarded; nor was defendant harmed by evidence showing the annual volume of business done by plaintiffs. *pp. 85, 86.*

SAME.—*Evidence.*—In a suit by tenants who occupied a part of a building as business rooms against tenants of another part of the building to abate a nuisance created by the latter consisting of an obstructing stairway and certain offensive and unhealthful odors, evidence that these odors were the subject of comment by plaintiffs' customers was competent as showing the nature and extent of the nuisance complained of, and the effect upon plaintiffs' business. *p. 86.*

SAME.—*What Constitutes.*—The erection of a stairway by tenants of a building so as to obstruct the rear entrance to rooms occupied by other tenants, and the creation of offensive odors by cooking, and by throwing refuse matter in the alley in the rear of the building, constitute a nuisance within the meaning of §290 Burns 1901. *pp. 86, 87.*

SAME.—*Mandatory Injunction.—Discretion of Court.*—In a suit to abate a nuisance, and for an injunction, a mandatory order that a stairway which obstructed an entrance to plaintiffs' rooms be removed will not be reversed, where no abuse of discretion is shown. *p. 87.*

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APPEAL AND ERROR.—*Decree Not Sustained by Evidence.*—*Motion to Modify.*—Where any part of a decree is not sustained by the evidence, the remedy is by motion to modify; and where no motion was made to modify, the question can not be reviewed on appeal. pp. 87, 88.

From Henry Circuit Court; *W. O. Barnard*, Judge.

Suit by Thomas L. Campbell and another against James K. Shroyer. From a decree for plaintiffs, defendant appeals. *Affirmed.*

F. E. Beach and *Wm. A. Brown*, for appellant.

M. E. Forkner and *G. D. Forkner*, for appellees.

ROBINSON, J.—Suit by appellees to enjoin and abate a nuisance. When the case was submitted to the court for trial, and before the beginning of the evidence, appellant filed a written request for a special finding of the facts. The court made a general finding, upon which a decree was rendered.

It is the duty of the court to find the facts specially upon a proper request, but this right to a special finding might be waived by the party after the request is made. And it will be presumed to have been waived where, without any objection made or exception taken, the court makes a general finding and renders thereon a decree. After the evidence was heard, the court may have inadvertently made the general finding, and the action of the trial court can not be reviewed without first having given the court an opportunity to correct the error. See *Tague v. Owens*, 11 Ind. App. 200.

At the proper time appellant demanded that the issues of fact be tried by a jury, which was refused. The code provides that "Issues of law and issues of fact in causes that, prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court." §412 Burns 1901. As a complaint for injunction invokes the equity powers of the court, a trial by jury can not be demanded. Such an action belongs exclusively to

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the equitable jurisdiction of courts; and while the court may now, as it could prior to the adoption of the code of 1852, in cases triable by the court, in its discretion, for its information, cause any question of fact to be tried by a jury, yet a party can not demand as of right a trial by jury in such cases. *Helm v. First Nat. Bank*, 91 Ind. 44; *Pence v. Garrison*, 93 Ind. 345; *Evans v. Nealis*, 87 Ind. 262.

The building occupied by the parties to this suit is a three-story brick building. On the first floor are two store-rooms separated by a stairway leading to the second story, in which is a hallway about four feet wide. Appellees occupy the first and second stories of the east part of the building as a dry-goods store and millinery store, and appellant lives in three rooms in the second story of the west part. In the rear of the building is an open alleyway appurtenant thereto, upon which the building abutted, and into this way opened the rear exits, doors and windows. It is charged that appellant has constructed over this way a room with a stairway leading down in front of the door that leads into this way from the building, completely closing up the door, and cutting off all light and ventilation into the room, and blockading the free use of the way; that appellant cooked in the rooms he occupied, and that the odor, steam, and vapor escaped into and settled on appellees' goods, rendering them unsalable; that he constantly throws into the alley certain described refuse matter, which putrifies, and gives off offensive and unhealthful odors which escape into the store, preventing the use of the windows for ventilation without danger to the health of appellees and their employes. Appellees are tenants under a lease of the rooms, and the acts complained of are a wrongful interference with the use of the rooms, and a special injury to the tenant.

As the amount of damages awarded was nominal, there was no reversible error in permitting evidence to be intro-

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duced as to the rental value of the rooms occupied by appellees if the premises were free from the annoyances about which complaint was made. Nor is it made to appear that appellant was harmed by evidence showing the annual volume of business done by appellees.

It was not harmful error to permit one of the appellees to testify that these odors were the subject of remarks by their customers. No attempt was made to prove any statement made by any one. Such evidence was competent as showing the nature and extent of the nuisance complained of, and the effect upon appellees' business.

The statute (§290 Burns 1901) provides that "whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." There is evidence of the existence of the acts complained of, and that they come within the scope of this statutory provision. Much of the argument in appellant's brief is upon the evidence, but we can not interfere with the court's conclusion upon the weight of the evidence. We quite agree with counsel for appellant that cooking is not a nuisance *per se*. Nor can it be said that the cooking of onions and cabbage is necessarily a nuisance. And we find nothing in the decree that will prevent appellant from indulging his taste in this respect in such a way as he may see proper. But we are not prepared to say that under no circumstances could a person be prevented from permitting odors and vapors from a kitchen to escape into an adjoining building or room.

"The corruption of the atmosphere," says the author of Wood, Nuisance (3d ed.), §561, "by the exercise of any trade or any use of property that impregnates it with noisome stench has ever been regarded as among the worst class of nuisances, and the books are full of cases in which any use of property producing these results has been re-

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garded as noxious and a nuisance whether arising from the exercise of a trade, or business, or from the ordinary or even necessary uses of the property." In §10 the same author says: "No man is at liberty to use his own [property] without reference to the health, comfort, or reasonable enjoyment of like public or private rights by others. Every man gives up something of this absolute right of dominion and use of his own, to be regulated or restrained by law, so that others may not be hurt or hindered unreasonably in the use or enjoyment of their property. This is the fundamental principle of all regulated civil communities, and without it society could hardly exist, except by the law of the strongest. This illegal, unreasonable and unjustifiable use to the injury of another, or of the public, the law denominates a nuisance." See *Radican v. Buckley*, 138 Ind. 582; *Haggart v. Stehlin*, 137 Ind. 43, 22 L. R. A. 577; *Grady v. Wolsner*, 46 Ala. 381, 7 Am. Rep. 593; *Owen v. Phillips*, 73 Ind. 284.

In the decree the court made a mandatory order that the obstruction placed in the alleyway at the rear of the building be removed. From the record the court was authorized to conclude that there had been a wrongful invasion of appellees' rights irreparable and continuing in its nature, and might issue a mandatory injunction. *Brauns v. Gleisige*, 130 Ind. 167; *Lake Erie, etc., R. Co. v. Essington*, 27 Ind. App. 291. Whether a mandatory injunction will be decreed in any case is a matter largely in the discretion of the court, and we can not say there was any abuse of this discretion in the case at bar. See *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; *Lynch v. Union Inst. for Sav.*, 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. 405; 1 High, Injunctions (3d ed.), §§2, 708. It can not be said that the court granted appellees any greater relief than they were entitled to under the evidence. Moreover, if any part of the decree is not sustained by the

... moved to modify the de-
... *Wood v. State, ex rel.*, 130

... error. Judgment affirmed.

NICKEY ET AL. v. ZONKER.

No. 4,291. Filed May 12, 1903.]

...—*Counterclaim.*—In an action for conversion, a
... by defendant, based upon alleged facts in no way
... with the acts of conversion complained of, is properly
... pp. 89, 90.

... *Quantity of Evidence a Question of Law.*—The question as to
... evidence is material is a question of law, the determina-
... of which, in a civil action, is solely with the court: p. 90.

From Steuben Circuit Court; J. A. Woodhull, Special
Judge.

Action by Anthony Zonker against Addison B. Nickey
and others. From a judgment for plaintiff, defendants
appeal. *Reversed.*

T. R. Marshall, W. F. McNaghy, P. H. Clugston, D. M.
Link and S. A. Wood, for appellants.

C. M. Phillips, T. A. Redmond, S. A. Powers, A. C. Wood,
W. G. Croxton and F. M. Powers, for appellee.

HENLEY, J.—The first trial of this cause was in the
DeKalb Circuit Court, where the action was originally
commenced. A *venire de novo* was granted, and the cause
venued to Steuben county, where the second trial occurred.
Upon appeal to this court, the judgment of the circuit court
of Steuben county was reversed. *Nickey v. Zonker*, 22
Ind. App. 211. This appeal is from a judgment rendered
against appellants upon the third trial of the cause.

Briefly stated, the facts out of which the controversy
arose were as follows: Anthony Zonker, in the year 1895,
was the owner of real estate in DeKalb county, on which

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there was standing growing timber which he desired to sell. Appellant Daniel Blucher was engaged in the business of buying standing timber. Blucher purchased of Zonker the timber in dispute under a certain agreement, by the terms of which Blucher agreed to cut the trees and saw them into logs, and pay for them before removing them from the ground. Upon the question of grading, Blucher contends that it was agreed that he should grade and scale the timber, and Zonker contends that the timber was to be graded and scaled to his satisfaction, all of which, including the payment of the purchase price, it was agreed should be done before any of the timber could be removed. Blucher sold the timber in the meantime to his co-appellants, who were engaged in the manufacture of lumber under the firm name of A. B. Nickey & Sons, who thereupon removed the timber from the premises and possession of appellee. At the time A. B. Nickey & Sons took possession of and removed the timber from the land of appellee, it is appellee's claim that Blucher had not paid him for it, nor had it been scaled and graded to his satisfaction. Appellee's complaint is for damages for the conversion of the timber by appellants.

Appellant Blucher filed a counterclaim in two paragraphs. All of the appellants answered by general denial. Appellee's motion to strike out the counterclaim of appellant Blucher was sustained. This action of the trial court is the first alleged error brought to our notice. Appellants' brief does not contain any statement of the contents of the counterclaim, and we might well refuse to consider its sufficiency. An examination of the record, however, discloses that the facts averred in the counterclaim are not connected with and do not depend upon the acts of conversion upon which appellee's cause of action is based. *Crowe v. Kell*, 7 Ind. App. 683.

The conversion of the timber was a tort, pure and simple, and wholly disconnected from the contract between

Blucher and Zonker. The counterclaim was properly stricken out.

Appellants' motion for a new trial, which was overruled, assigns, amongst other causes, that the court erred in giving to the jury each of a large number of instructions. The instructions given the jury cover thirty-three typewritten pages of the record. We are convinced that the instructions, considered as a whole, had a tendency to confuse the jury. And in instruction number thirty the jury were told that they were the judges of the materiality of the testimony of the witnesses. This is not the law. The question of whether the evidence is material is for the court, and all the evidence which the court decides is material must be considered by the jury with due regard to the credibility of the witnesses; for, of the credibility of the witnesses and the weight of the testimony, the jurors are the judges. The question of whether evidence is material is a question of law, the determination of which, in a civil action, is solely with the court.

Appellants' motion for a new trial ought to have been sustained. Judgment reversed, with instruction to the trial court to grant a new trial.

MATTHEWS v. WILSON ET AL.

[No. 4,380. Filed May 12, 1903.]

DIVORCE.—*Decree Providing for Maintenance of Minor Child.*—*When not a Lien on Defendant's Realty.*—A decree in a divorce proceeding, adjudging that the support, maintenance, and education of a minor child shall be a lien on the real estate of the father who was the defendant in the suit, the same to be paid out to the mother on petition to the court in such annual or semiannual sums as to the court might seem proper, is not a final judgment, and therefore not a lien on the defendant's real estate. pp. 93, 94.

LIMITATION OF ACTIONS.—*Divorce Decree.*—*Lien for Support of Child.*—A lien against the real estate of the defendant in a divorce proceeding, to secure the payment of an allowance for the support of

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a minor child, is barred by the statute of limitations after ten years. *p. 96.*

EQUITY.—Laches.—Unexplained delay in the prosecution of a right until it becomes stale constitutes such laches as forfeit the interference of the court. *p. 97.*

From Warrick Circuit Court; *C. W. Cook*, Special Judge.

Suit by Celestia Matthews against Wesley Wilson and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

W. Z. Bennett and George Palmer, for appellant.

J. W. Wilson and Edward Gough, for appellees.

WILEY, J.—Appellant, in her amended complaint, averred that on and prior to September, 1882, she was the wife of one Albert Johnson; that on said date, by a decree of the Warrick Circuit Court, she was granted a divorce from her said husband, together with a judgment for alimony and a decree giving to her the care and custody of her minor child, Katie; that by the decree the said Albert Johnson was charged with the reasonable expenses to be incurred in the support, maintenance, and education of said infant until she should arrive at the age of twenty-one years, or until she should die or marry, and that the same should be a lien against the real estate of said Johnson, and the same should be paid out to appellant, or other proper person, on petition to the court, if he “fails or refuses to pay it in such annual or semiannual sums as to the court may appear just and proper.” It is further charged that at the date of said decree said Johnson was the owner of certain described real estate in said county; that on and after said decree appellant assumed the exclusive custody of said child, and has ever since had her care and custody; that said child is still living, is not twenty-one years old, and is not married; that appellant has ever since maintained, supported, and educated her; that she has expended large sums of money for medicine

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and medical services for her, aggregating \$300; that the reasonable value of said support, maintenance, education, etc., is \$3 per week, amounting to \$2,800, which sum is due and unpaid. It is also averred that said Albert Johnson died intestate in said county January 1, 1897, and that his estate was duly and finally settled in the Warrick Circuit Court December 8, 1895; that appellant did not file any claim against his estate, but relied upon the security of the lien and charge created and given by said decree; that after said decree the said Johnson never paid appellant for the support and maintenance of said child any sum whatever, and that nothing was paid from or by his estate; that on December 5, 1891, said Johnson mortgaged his said real estate to one Joseph Funk to secure a loan of \$2,000; that when said loan was made said Funk had notice of said decree and of the lien and charge for the support and maintenance of said child; that thereafter said Funk died in Warrick county, Indiana, and the appellee Bernard Herr was appointed administrator of his estate, which trust is still pending; that as such administrator said Herr brought an action in the Warrick Circuit Court to foreclose said mortgage, and on March 18, 1896, obtained a judgment for \$2,287.84, and a decree of foreclosure; that under said judgment and decree said real estate was sold by the sheriff, and was bid in by said administrator for the amount of the judgment, interest, and costs; that a certificate of said sale was duly issued; that on April 17, 1897, said administrator, without first obtaining an order from court, sold and assigned said certificate to appellee Wilson, who had notice of said divorce decree and the lien thereby created; that on April 19, 1897, said Wilson procured from the sheriff of the said county a deed for said real estate upon said certificate and assignment, and thereupon took possession of the real estate so conveyed, and has ever since been in possession thereof. It is also averred that the sale of said certificate

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to Wilson was never brought to the knowledge of the court, and was never approved or confirmed, and that by reason thereof said sale, assignment, and deed are void, and the legal title to said real estate is in the legal heirs of said Johnson, who are made parties to answer as to their interests. The prayer of the complaint is that the amount due appellant for the support, maintenance, and education of said child be declared a lien and charge on said real estate, and that the same be ordered sold to pay and satisfy her demand. Appellees, Wilson, Herr, and Herr, administrator, demurred separately to the complaint, which demurrers were sustained. The other defendants, the heirs of Johnson, deceased, filed a disclaimer. Appellant refused to plead further, and judgment was rendered against her for costs.

The points of contention presented by the record may be briefly stated as follows: (1) Did that part of the decree relating to the support and maintenance of the minor child create a lien or charge against the real estate of Albert Johnson? (2) If so, was such lien barred by the statute of limitations?

This action was commenced at the December term, 1900, of the Warrick Circuit Court, and the decree in the divorce proceedings was rendered September 29, 1882. It therefore appears that more than eighteen years elapsed between the rendition of the decree and the commencement of this action.

It is important to determine what was adjudicated in the divorce proceedings, and what might have been adjudicated under the issues and the statute. It is apparent from the record that an attempt was made to adjudicate four important matters: (1) The question of appellant's right to a divorce; (2) the question of her right to alimony, and the amount she was entitled to recover; (3) the question of the custody of the infant child; and (4) the question of the support and maintenance of it. These are all

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supra. It is evident from the language of the statute that it was the intention of the legislature that a court should, in the decree for divorce, make provision for the support, etc., of the minor children, when their custody was taken from the father, by determining the amount, to whom paid, and the manner of its payment. No other construction would render the statute effective.

It is to be observed that the decree makes no provision for the payment of any amount or sum of money, and, whether it be regarded as a judgment or a decree in equity, the result is the same, for under the code judgments at law and decrees in equity are all "judgments," for by the code distinctions are abolished. *Hord v. Bradbury*, 156 Ind. 20. Under §588 Burns 1901, "The judgment must be entered on the order-book, and specify clearly the relief granted, or other determination of the action."

In the case at bar, the decree in the divorce proceedings does not specify any relief or fix any liability, and under the authorities we can not see our way clear to hold that any lien or charge was fixed upon the real estate of the husband. Should we, however, be wrong in our conclusion upon this question, appellant is without any remedy for two reasons: (1) Whether that part of the order relating to the support and education of the child be regarded as a judgment at law or a decree in equity, the lien, if any, is barred under the statute. Judgments in this State are made liens upon real estate of judgment defendants in the county where they are rendered for a period of ten years, and no longer. As a judgment is a lien only by virtue of the statute, it ceases to be a lien at the expiration of the time fixed by the statute. (2) Appellant is here seeking to enforce what her counsel are pleased to designate as equitable relief. She has slept on her rights, whatever they were, for over eighteen years. She suffered the estate of her divorced husband to be settled in court, and made no claim against it for the support of her child. Her divorced

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husband mortgaged the real estate against which she now seeks to enforce a lien, and she permitted that mortgage to be foreclosed, and the title to pass to a third person, without asserting any claim against it. After all this she comes into court with what a court of equity would designate as a "stale" claim, and asks that court to enforce it. She has not attempted to show any cause or reason why she has remained silent so long.

It is a settled doctrine of courts of equity that unexplained delay in the prosecution of a right until it becomes stale constitutes such laches as forfeit the interference of the court. *Valentine v. Wysor*, 123 Ind. 47, 7 L. R. A. 788; *Smith v. Thompson*, 7 Grat. 112, 54 Am. Dec. 126 and note; *Hough v. Coughlan*, 41 Ill. 131; Story, Eq. Jurisp. (13th ed.), §1520. "*Expediit reipublicae ut sit finis litium*," is a maxim that has found favor in the courts of this country and England from the earliest history of jurisprudence; and a court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party seeking redress has slept upon his rights; and nothing will call forth such courts into activity, but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced. This doctrine was announced by Lord Camden in *Smith v. Clay*, Ambl. 645, and has never been criticised. See note to *Deloraine v. Brown*, 3 Bro. C. C. 639. In note to *Smith v. Thompson*, *supra*, many English and American cases are cited in support of it. See, also, *Frame v. Kenny*, 12 Am. Dec. 367. In the case before us there is an unexplained delay of nearly two decades. Appellant has slept upon her rights, and she is without remedy.

Judgment affirmed.

Roby, C. J., concurs in the conclusion.

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HILL v. INDIANAPOLIS AND VINCENNES RAILROAD
COMPANY ET AL.

[No. 4,782. Filed May 12, 1903.]

APPEAL.—*Assignment of Error*.—An assignment that “the court erred in rendering judgment” presents no question on appeal. *p. 99.*

SAME.—*Exception*.—*Review*.—Where an exception is not taken, the ruling of the court can not be successfully attacked on appeal. *p. 99.*

RAILROADS.—*Injury to Licensee*.—*Contributory Negligence*.—Plaintiff, who was sixty years old and in full possession of his faculties, went to a railroad station to meet a train. After the arrival of the train, and before it pulled out, plaintiff left the depot, walking between the main track and a side-track, which space the public was licensed to use as a footway. The train followed in the same direction and struck plaintiff who was walking too near the track and not looking nor listening for the train at the time. Plaintiff knew the train would proceed in the direction and at the time it did, and was familiar with the tracks, crossings, and surroundings. *Held*, that the plaintiff was guilty of contributory negligence. *pp. 100-102.*

TRIAL.—*Verdict*.—*Special Findings*.—*Conflict*.—When the special finding of facts is irreconcilably in conflict with the general verdict, the former must control. *p. 101.*

From Morgan Circuit Court; *M. H. Parks*, Judge.

Action by Harrison Hill against the Indianapolis & Vincennes Railroad Company and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

J. V. Mitchell, D. E. Watson and Oscar Matthews, for appellant.

S. O. Pickens and R. F. Davidson, for appellees.

COMSTOCK, J.—Appellant brought his action against appellees to recover damages for personal injuries sustained by him by reason of alleged negligent and wilful acts of appellees. The complaint was in four paragraphs. The first and second each charge the injuries to have been negligently, the third and fourth to have been wilfully, done. The cause was put at issue by general denial. The jury

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returned a verdict in favor of appellant for \$1,000 upon the first and second paragraphs of the complaint. With the general verdict, answers to interrogatories were returned. The trial court overruled appellant's motion for judgment on the verdict, and sustained appellees' motion for judgment on the answers to interrogatories notwithstanding the general verdict.

The only assignment of error is that "The court erred in overruling appellant's motion for judgment on the general verdict, and in rendering judgment for appellees and against appellant on the special findings *non obstante*."

It is insisted by appellees, before entering upon the discussion of the merits of the appeal, that the assignment of error presents no question for review. In one specification, two rulings of the court are assailed. The assignment that "the court erred in rendering judgment for the appellees" has been held insufficient. *Seisler v. Smith*, 150 Ind. 88; *Hawks v. Mayor*, 144 Ind. 343; *McGinnis v. Boyd*, 144 Ind. 393; *Kimberlin v. Tow*, 133 Ind. 696. Appellant excepted to the refusal of the court to render judgment in his favor on the general verdict. No exception was taken to the action of the court in sustaining appellees' motion for judgment.

Reserving an exception to the ruling of the trial court is a step in taking an appeal. If an exception is not taken, the ruling of the court can not be successfully attacked on appeal. See Ewbank's Manual, §7, and cases cited. The rule is general that where there are several rulings each must be separately challenged, and an exception must be taken to each. *Saunders v. Montgomery*, 143 Ind. 185, and cases cited. The assignment is joint as to both rulings. It must be good as to both, or fail. No question being reserved upon the ruling of the court in rendering judgment in favor of appellees, the assignment is insufficient. *Moore v. Morris*, 142 Ind. 354; *Florer v. State, ex rel.*, 133 Ind. 453.

We have, however, considered the answers to interrogatories. They show the following facts pertinent to the question of appellant's contributory negligence: The passenger station of the appellee Indianapolis & Vincennes Railroad Company, at Martinsville, Indiana, is located at the intersection of the railroad tracks and Pike street in said city. The main track runs in a straight line from the station southwest to Morgan street, which crosses said track at a point about 364 feet from Pike street. A side-track connects with the main track some distance southwest of Morgan street, and extends from that point northeastwardly on the southeast side of said main track past the station. On the 13th day of April, 1899, in the afternoon, a passenger-train operated by the appellee the Pennsylvania Company, with the appellee Revel as engineer, consisting of the engine, one baggage car, and two coaches, stopped at the station on its regular trip to discharge and receive passengers. The appellant, who kept a boarding-house, was there for the purpose of soliciting travelers to stop at his house. While the train was still standing at the station, appellant walked past it, and along the southeast side of the main track, towards Morgan street. With him, or just behind him, were two other men, going in the same direction. When the train started, appellant was walking in a safe place, between the main track and the side-track, where he continued to walk for some distance. He then stepped over near the main track, upon which the train was approaching, and walked along said track with his back to the train until he was struck by the engine and injured. The train was running at a speed of about four miles per hour, and had proceeded to a point about 314 feet from the depot or station when the collision occurred. The engineer was at his place, on the right side of the engine. The fireman, whose position was on the left side and next to the appellant, was not in his place. Neither of them saw the appellant before he was struck. The bell on the

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engine was not ringing. The space between the main track and the side-track, where appellant was walking, is forty feet wide at Pike street and twenty-five feet wide at the point where the accident happened. By common consent this strip of ground between the tracks had been used by the public as a highway for thirty-one years. The appellant was sixty years old at the time of his injury, and in full possession of all his faculties. He had been in the habit of going to the station on the arrival and departure of trains, and was familiar with the tracks, crossings, and surroundings. He knew, or had reason to believe, that the train which struck him, after discharging and receiving passengers at the depot, would proceed on its way upon the track beside which he was walking. Between the station and the point where appellant was injured there was no obstruction to his view. He could have seen the approaching train if he had looked for it, and could have heard it if he had listened. He did not look for the train nor listen for it at any time from the time it began to move until the accident happened. There was ample space between the tracks, where the plaintiff might have walked without exposing himself to danger.

It is evident from these findings that appellees were negligent. They also show that appellant was guilty of contributory negligence. Appellees' negligence did not excuse appellant from the exercise of care. A railroad track is a warning of danger; and one approaching it must use caution commensurate with his knowledge. Appellant was familiar with the surroundings, had knowledge of his danger, and used no care to protect himself from injury. When the special finding of facts is irreconcilably in conflict with the general verdict, the former must control. If a single fact is found that precludes recovery, the special findings control. *Cleveland, etc., R. Co. v. Johnson*, 7 Ind. App. 441; *American Wire Nail Co. v. Connelly*, 8 Ind. App. 398; *Consolidated Stone Co. v. Redmon*, 23 Ind. App. 319.

In *Pennsylvania Co. v. Meyers*, 136 Ind. 242, the Supreme Court say: "It is the established rule that such a motion can only be sustained where the answers to the special interrogatories can not be reconciled with the general verdict upon any supposable state of the evidence, and where, as here, the issue was made by the answer of the general denial only, and such special findings controvert some fact or facts which constitute an essential and indispensable part of the plaintiff's cause of action. In such a case, the special findings are in irreconcilable conflict with the general verdict. In the case at bar, the general verdict necessarily affirms that the intestate looked and listened for the approach of the train that struck and killed him, and that he exercised due care and caution to avoid the injury occasioned thereby. All of this is flatly contradicted by the special findings. In case of such conflict, the statute requires us to treat the special findings as true, and the general verdict, to the extent of such conflict, as untrue; and requires us to hold that the former shall control the latter, and to give judgment accordingly."

The fact that appellant was a licensee could not release him from the exercise of care to protect himself from injury: that care is incumbent alike upon a licensee and a trespasser. The contributory negligence of appellant affirmatively appears from the special findings, and the trial court correctly rendered judgment in favor of appellees.

Judgment affirmed.

ROBY, C. J.—I concur in the decision so far as it is based upon the merits of the case. I concede its correctness upon the questions of practice under the authorities, but I regard them as too artificial for the purposes of substantial justice.

WABASH RAILROAD COMPANY v. LACKEY ET AL.

[No. 4,393. Filed May 13, 1903.]

RAILROADS.—Fires Escaping from Right of Way.—Damages to Land not Contiguous.—Complaint.—A complaint against a railroad company for damages from fire to land not contiguous to defendant's right of way need not aver that the fire was negligently permitted to escape from the intervening land, where it contains the allegation that the fire was negligently permitted to escape from the right of way. *pp. 104, 105.*

APPEAL.—When Record Fails to Show Paragraph on which Verdict Rests.—Where, on appeal, it does not affirmatively appear from the record upon which of several paragraphs of complaint a verdict rests, the judgment must be reversed if any paragraph is bad. *p. 106.*

From St. Joseph Circuit Court; *W. A. Funk*, Judge.

Action by Mary A. Lackey and others against the Wabash Railroad Company. From a judgment for plaintiffs, defendant appeals. *Reversed.*

E. P. Hammond, W. V. Stuart, D. W. Simms and G. E. Clarke, for appellant.

E. E. Weir and Lemuel Darrow, for appellees.

ROBINSON, J.—Suit by appellees for damages from fire alleged to have escaped from appellant's right of way to appellees' premises. The amended complaint is in three paragraphs. The first avers that appellees' lands adjoin the land of one Shultz, through whose land the road runs; that appellant had carelessly permitted dry grass, weeds, and other combustible material to accumulate on its right of way; that it negligently set fire to this material with sparks from an engine; that it negligently permitted the fire to escape from its right of way to the lands of Shultz; "that the fire so set out by the defendant as aforesaid was communicated from the lands of the said Shultz to the lands of these plaintiffs, igniting the lands" of appellees. The second paragraph avers the negligent accumulation of com-

bustible material on the right of way, and that it was ignited by a spark from a locomotive; that "the fire so ignited on the right of way of defendant was by the defendant carelessly and negligently suffered and permitted to escape therefrom to the lands of the said Shultz, igniting the same, and from thence to the lands of these plaintiffs, igniting the turf thereof," to their damage. The third paragraph recites the same facts as the first and second, but does not aver that any act of appellant, whether of commission or of omission, was careless or negligent. A demurrer to each paragraph of the complaint was overruled. A trial by jury resulted in a verdict for appellees. The sufficiency of the complaint is the only question argued by appellant.

Counsel argue that the first paragraph of complaint is insufficient because of its failure to charge negligence in permitting the fire to escape from the lands of Schultz to the lands of appellees. It sufficiently appears from the language of the pleading that the fire that burned appellees' property was a continuation of the fire that started on appellant's right of way. The courts recognize a well defined distinction between negligently igniting material on the right of way, and negligently permitting such fire to escape from the right of way and communicate to the property of other persons. *Pittsburgh, etc., R. Co. v. Culver*, 60 Ind. 469; *Pittsburgh, etc., R. Co. v. Hixon*, 79 Ind. 111; *Louisville, etc., R. Co. v. Ehlert*, 87 Ind. 339. But we do not understand the rule to be that the complaint must aver that the company negligently permitted the fire to escape from each successive tract of land after it left the right of way until it reached the land of the party complaining. In such a case, negligence in permitting the fire to escape onto the adjoining land "is the gist of the action." *Louisville, etc., R. Co. v. Ehlert, supra*; *Pittsburgh, etc., R. Co. v. Culver, supra*; *Louisville, etc., R. Co. v. Hanmann*, 87 Ind. 422.

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In the case last above cited the complaint averred that the company negligently permitted combustible matter to remain upon its right of way at a time of drouth, and that an employe so negligently ran an engine that it fired the grass "and other combustible material grown and accumulated upon the lands in the vicinity of, adjoining, and lying between the railroad and appellee's land." It is true in that case there was a general averment that the fire was the result of the company's negligence; but, aside from that, the court said: "We think that, upon a reasonable construction of the complaint, negligence is charged, not only in setting fire to the grass, etc., upon the right of way, but also to grass, etc., upon adjoining lands, between the right of way and appellee's land. If grass, etc., upon adjoining lands was thus negligently fired, it would not seem necessary to allege further that the fire, ignited upon the right of way, was negligently allowed to escape." It would seem that the same course of reasoning that would sustain appellant's claim in the case at bar would have required the above case to hold that the complaint must show also that the company negligently permitted the fire to escape from the adjoining land to the appellee's land.

Moreover, construing the pleading as showing that the fire that did the damage was a continuous fire from that which escaped from the right of way, the question presented has been decided by this court. In *Chicago, etc., R. Co. v. Burden*, 14 Ind. App. 512, the court said: "It is alleged that the fire originated on the right of way and that the defendant negligently permitted it to escape to contiguous land and from thence to plaintiff's lands. The gist of the action is the negligence in permitting the fire to escape from the right of way. If the first escape was a negligent one, and the fire which did the damage a continuous one, the appellant must answer for the damage done",—citing *Lake Erie, etc., R. Co. v. Miller*, 9 Ind. App. 192; *Louisville, etc., R. Co. v. Krinning*, 87 Ind. 351.

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What we have said above applies to the second paragraph, and we think the first and second paragraphs good against a demurrer.

The third paragraph of the complaint is clearly insufficient, and the demurrer to it should have been sustained. And it has been held a number of times that if it does not affirmatively appear from the record upon which paragraph of the complaint the verdict rests, the judgment must be reversed if any paragraph of the complaint is bad; but if the record affirmatively shows that the verdict and judgment are based entirely on another paragraph which is good, the erroneous ruling is harmless. Ewbank's Manual, §257, and cases there cited. Counsel for appellees admit that the third paragraph of complaint is insufficient, and that overruling the demurrer to that paragraph was error, but insist that the record shows that appellant was not harmed by the ruling. It is not claimed that the record affirmatively shows that the verdict is based entirely upon the first or second paragraphs, but it is claimed that the court's instructions to the jury show that the court's ruling on the demurrer was harmless. But we can not say that this is shown by the instructions. An issue was formed upon this paragraph, and appellant was required to go to trial upon a paragraph of complaint that was clearly insufficient. The evidence has not been brought into the record, and there is nothing in the answers to interrogatories that indicates in any way upon which paragraph the verdict rests. It is true the court assumed that the third paragraph was good, and told the jury that the gravamen of the three paragraphs of the complaint is negligent escape of the fire from the right of way to the lands of appellees. But we fail to see anything in this that affirmatively shows that the verdict was returned upon the good paragraphs. There were other essential acts of negligence wholly omitted from the third paragraph. The rule is not that the record does not show that the verdict rests upon the bad paragraph, but

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that it affirmatively appears that the verdict rests upon a good paragraph. Our attention has been called to nothing that takes the case out of the general rule.

Judgment reversed.

GRAND LODGE ANCIENT ORDER OF UNITED
WORKMEN v. HALL.

[No. 4,430. Filed May 14, 1903.]

BENEFICIAL ASSOCIATIONS.—Action on Certificate.—Complaint.—To entitle the beneficiary to recover the amount designated by the certificate in a beneficial association, it is essential that the complaint show, by express averment, full performance of all the conditions imposed by the contract of insurance and laws of the order, or facts by which such conditions have been waived. *p. 108.*

SAME.—Action by Beneficiary.—Complaint.—In an action on a certificate of insurance in a beneficial association, an allegation in the complaint that the deceased was at the time of his death a member of the order, and entitled to all the rights and privileges of such member, does not supply the necessary averment of performance of all conditions; since it is only the statement of a conclusion. *p. 109.*

SAME.—Performance of Conditions by Member.—Question of Law.—Whether a deceased member of a benefit society was at the time of his death entitled to all the rights and privileges of the society is, in an action on a benefit certificate, a question of law for the court to determine from the facts that exist and are pleaded. *p. 109.*

From Perry Circuit Court; *E. M. Swan*, Judge.

Action by Sue R. Hall against the Grand Lodge Ancient Order of United Workmen. From a judgment for plaintiff, defendant appeals. *Reversed.*

C. L. Wedding, for appellant.

C. A. Weathers and *W. M. Waldschmidt*, for appellee.

WILEY, J.—Appellee sued appellant upon a certificate of insurance, and cast her complaint in six paragraphs. To each of these paragraphs a demurrer was overruled, and such ruling presents the only question discussed by counsel.

**HILL v. INDIANAPOLIS AND VINCENNES RAILROAD
COMPANY ET AL.**

[No. 4,782. Filed May 12, 1903.]

APPEAL.—*Assignment of Error.*—An assignment that “the court erred in rendering judgment” presents no question on appeal. *p. 99.*

SAME.—*Exception.*—*Review.*—Where an exception is not taken, the ruling of the court can not be successfully attacked on appeal. *p. 99.*

RAILROADS.—*Injury to Licensee.*—*Contributory Negligence.*—Plaintiff, who was sixty years old and in full possession of his faculties, went to a railroad station to meet a train. After the arrival of the train, and before it pulled out, plaintiff left the depot, walking between the main track and a side-track, which space the public was licensed to use as a footway. The train followed in the same direction and struck plaintiff who was walking too near the track and not looking nor listening for the train at the time. Plaintiff knew the train would proceed in the direction and at the time it did, and was familiar with the tracks, crossings, and surroundings. *Held*, that the plaintiff was guilty of contributory negligence. *pp. 100–102.*

TRIAL.—*Verdict.*—*Special Findings.*—*Conflict.*—When the special finding of facts is irreconcilably in conflict with the general verdict, the former must control. *p. 101.*

From Morgan Circuit Court; *M. H. Parks*, Judge.

Action by Harrison Hill against the Indianapolis & Vincennes Railroad Company and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

J. V. Mitchell, D. E. Watson and Oscar Matthews, for appellant.

S. O. Pickens and R. F. Davidson, for appellees.

COMSTOCK, J.—Appellant brought his action against appellees to recover damages for personal injuries sustained by him by reason of alleged negligent and wilful acts of appellees. The complaint was in four paragraphs. The first and second each charge the injuries to have been negligently, the third and fourth to have been wilfully, done. The cause was put at issue by general denial. The jury

Hill v. Indianapolis, etc., R. Co.

returned a verdict in favor of appellant for \$1,000 upon the first and second paragraphs of the complaint. With the general verdict, answers to interrogatories were returned. The trial court overruled appellant's motion for judgment on the verdict, and sustained appellees' motion for judgment on the answers to interrogatories notwithstanding the general verdict.

The only assignment of error is that "The court erred in overruling appellant's motion for judgment on the general verdict, and in rendering judgment for appellees and against appellant on the special findings *non obstante*."

It is insisted by appellees, before entering upon the discussion of the merits of the appeal, that the assignment of error presents no question for review. In one specification, two rulings of the court are assailed. The assignment that "the court erred in rendering judgment for the appellees" has been held insufficient. *Seisler v. Smith*, 150 Ind. 88; *Hawks v. Mayor*, 144 Ind. 343; *McGinnis v. Boyd*, 144 Ind. 393; *Kimberlin v. Tow*, 133 Ind. 696. Appellant excepted to the refusal of the court to render judgment in his favor on the general verdict. No exception was taken to the action of the court in sustaining appellees' motion for judgment.

Reserving an exception to the ruling of the trial court is a step in taking an appeal. If an exception is not taken, the ruling of the court can not be successfully attacked on appeal. See Ewbank's Manual, §7, and cases cited. The rule is general that where there are several rulings each must be separately challenged, and an exception must be taken to each. *Saunders v. Montgomery*, 143 Ind. 185, and cases cited. The assignment is joint as to both rulings. It must be good as to both, or fail. No question being reserved upon the ruling of the court in rendering judgment in favor of appellees, the assignment is insufficient. *Moore v. Morris*, 142 Ind. 354; *Florer v. State, ex rel.*, 133 Ind. 453.

Chicago, etc., R. Co. v. McGuire.

Caskey v. City of Greensburg, 78 Ind. 233, 237. Under these authorities the first paragraph of complaint is radically defective.

It does not affirmatively appear from the record upon which paragraph of the complaint the judgment rests, and, even if the other paragraphs are good, the judgment could not stand. As to whether the other paragraphs, or either of them, are good, we do not express an opinion, except to say that they fall far short of being model pleadings.

The judgment is reversed, and the trial court is directed to sustain the demurrer to the first paragraph of the complaint.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAIL-
WAY COMPANY v. MCGUIRE ET AL.

[No. 3,780. Filed January 7, 1903. Rehearing denied April 1, 1903.
Transfer denied May 14, 1903.]

MORTGAGES.—Railroads.—After-Acquired Property.—Use.—Judgments.—

Land adjacent to the depot grounds of a railroad company occupied by buildings leased for postoffice, grocery, barber shop, and other purposes foreign to the necessary means of operating the railroad, did not pass as after-acquired property for purposes connected with or appertaining to the railroad by the foreclosure of a mortgage executed by the railroad company containing a clause including after-acquired property appertaining to the railroad, and was subject to sale under a judgment obtained against the railroad company after the execution of the mortgage.

From White Circuit Court; *J. V. Kent*, Special Judge.

Suit by Chicago, Indianapolis & Louisville Railway Company against Patrick McGuire and others to quiet title. From a judgment for defendants, plaintiff appeals. *Affirmed.*

E. C. Field, *W. S. Kinnan*, *G. W. Kretzinger*, *H. R. Kurrie*, *E. B. Sellers* and *W. E. Uhl*, for appellant.

C. C. Spencer, *H. A. Steis*, *M. M. Hathaway* and *M. Winfield*, for appellees.

HENLEY, J.—This was an action commenced by appellant to quiet its title to a certain parcel of land situated in Pulaski county, Indiana. The cause was tried by a jury. After the evidence was concluded the trial judge instructed the jury to return a verdict for appellees. The question presented here arises upon the motion for a new trial, and questions the action of the trial court in so instructing the jury.

The facts upon which the instruction was based are not in dispute. Both appellant and appellees claim title through the Louisville, New Albany & Chicago Railway Company. Appellant claims title through certain mortgages given by the Louisville, New Albany & Chicago Railway Company which were foreclosed in the United States circuit court for the district of Indiana, and through which foreclosure, and other conveyances following it, its title became vested. Appellee's title is claimed as follows: On the 24th day of September, 1896, the appellee Patrick McGuire recovered judgment in the White Circuit Court of Indiana against the Louisville, New Albany & Chicago Railway Company for \$2,416.23 and costs. On the 16th day of October, 1897, the said McGuire caused an execution to be issued by the clerk of the White Circuit Court to the sheriff of Pulaski county. On the 18th day of October, 1897, the said sheriff levied the execution upon the real estate in dispute. On the 13th day of November, 1897, the sheriff sold this real estate at public sale, and the appellee Hathaway became its purchaser, and on the 22d day of November, 1898, the sheriff of Pulaski county executed to him a deed. A transcript of the McGuire judgment had been filed in the Pulaski Circuit Court on the 28th of January, 1897.

It is contended by appellant that the real estate in controversy is a part of its depot grounds at Francisville, Indiana, and that the foreclosure and sale of the property of the Louisville, New Albany & Chicago Railway Company,

through which foreclosure and sale appellant obtained whatever title it may have in the disputed premises, carried with it the title to said disputed premises. The judgment of McGuire against the Louisville, New Albany & Chicago Railway Company was obtained after the execution of the foreclosed mortgages through which appellant claims title. The contention of counsel for appellees is that the disputed property was not embraced within the mortgages and foreclosure, and that the same was not covered by the clause inserted in each mortgage intended to cover after-acquired property, and, therefore, could not have been embraced within the foreclosure and sale under the proceedings in the United States Court. An abstract question of law is therefore presented, as to whether or not the property in dispute passed by the foreclosure and sale. There were three mortgages executed by the Louisville, New Albany & Chicago Railway Company—one in 1886, one in 1890, and one in 1894; all being prior to the rendition of the McGuire judgment.

In the mortgage of 1886 the description of after-acquired property is as follows: "Which may at any time hereafter during the continuance of this trust be acquired by the said railroad company for purposes connected with or appertaining to the railroads or railways above mentioned or described." The description of the after-acquired property in the mortgage executed in 1890 was in the following words: "And all that it may in the future add, construct, or acquire for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described." The description of the after-acquired property in the mortgage executed in 1894 was in the following words: "What may at any time before or after the date of this indenture be acquired by or for the said railway company for purposes connected with or appertaining to said railroads or railways hereby conveyed."

The decree directing the sale of the Louisville, New Albany & Chicago Railway Company follows the description in the mortgage. The master's deed conveying the property does not vary the description as to after-acquired property. The property in dispute was property acquired by the Louisville, New Albany & Chicago Railway Company after the execution of the above described mortgages.

The trial court determined that the undisputed evidence established that the land levied upon and sold to satisfy appellees' judgment was not used by appellant for railroad purposes; that it was not needed for such purposes, and that it was not properly a part of the "lay-out" of the road; and that therefore the clauses in the mortgages covering after-acquired property did not cover the property in dispute. The evidence shows that the particular parcel of land in dispute has never been used by the railroad company for railroad purposes; that while it is contiguous to and adjacent to the depot grounds of appellant, it has buildings located upon it which have been leased to different parties, and occupied and used as a barber shop, grocery, postoffice, and in other ways entirely foreign to the necessary means of operating the railroad.

In speaking of the property covered by the after-acquired clause in a mortgage given by a railway company, Mr. Short, in his excellent work on the Law of Railway Bonds and Mortgages, at §209, says: "The lien will be confined to the lands which were prospectively necessary and convenient for the construction and future operation of the road, and will not embrace lands situated outside of the 'lay-out' of the road, which had been taken over by the company in order to acquire at a less cost the lands actually needed for the line itself."

A case very similar to the one under consideration is the case of *Seymour v. Cannandaigua, etc., R. Co.*, 25 Barb. 284. It involved a controversy between the judg-

ment creditors and the purchaser of railroad property at foreclosure sale, and in that case it was squarely held that all lands acquired by the railroad company after the execution of the mortgage, which were not used for railroad purposes, were not covered by the lien of the mortgage and did not pass by the foreclosure and sale to the purchaser, but were subject to a lien of the judgment creditors. The court in that case, at page 312, said: "It is in proof that some of the lands purchased in Batavia have never been used for railroad purposes. That in some instances whole lots were purchased to secure a right of way across them. If the railroad company for this purpose had purchased a lot of ten or one hundred acres, it can not be that any more of such lots would be embraced in this mortgage to the plaintiffs than was actually taken and required for the road. In respect to all such lands outside of the legal limits of their railroad track and branches, and excepting land used for shops, depots, stations, turnouts for wood or water, or other legitimate purposes, the lien of the defendants' judgments must prevail." To the same effect see: *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. Ed. 66; *Boston, etc., R. Co. v. Coffin*, 50 Conn. 150; *Mississippi Valley Co. v. Chicago, etc., R. Co.*, 58 Miss. 896; *Eldridge v. Smith*, 34 Vt. 484; *Shirley v. Waco Tap R. Co.*, 78 Tex. 136, 10 S. W. 543; *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 475; *Dinsmore v. Racine, etc., R. Co.*, 12 Wis. 725; *Farmers Loan, etc., Co. v. Commercial Bank*, 11 Wis. 215; *Walsh v. Barton*, 24 Ohio St. 28.

We think the trial court was right in instructing the jury, upon the evidence submitted, to return a verdict for appellees. Judgment affirmed.

**HOME SAVINGS ASSOCIATION v. NOBLESVILLE
MONTHLY MEETING OF FRIENDS CHURCH.**

[No. 3,954. Filed February 20, 1903. Motion to retax costs granted May 15, 1903.]

BUILDING AND LOAN ASSOCIATIONS. — *Liquidation.* — *Adjustment of Loans.*—Plaintiff, a borrower from a building and loan association, brought suit to have the amount of the mortgage lien ascertained and adjudged, demanding damages for breach of contract, and to quiet title upon payment of amount found due. It appeared that plaintiff subscribed for sixty-five shares of stock, thirty-five shares thereof to be "cash shares," and thirty shares "coupon shares," on which it was to have a loan of \$2,600 and pay fifty cents per share per month on the cash shares, and sixty cents on the coupon shares, for ninety-eight months in full payment of the loan, but the bond and mortgage were executed in accordance with the printed forms of the association, expressing a different contract. The association accepted payments for a period of fourteen months in accordance with the agreement, and then notified plaintiff that it had suspended business, and refused to receive further payments. *Held*, that the remedy sought by plaintiff is incompatible with the recovery of damages for the breach of the contract, and, in ascertaining the amount due on the loan, it not being properly disclosed whether the association was solvent or insolvent, the parties should be placed in the relation of debtor and creditor, and the borrower charged with legal rate of interest on the loan from the date of its execution to the time of the rendition of the finding, and credited with the amount paid as interest and premium, as treated by the association in distributing the same upon its books.

From Hamilton Circuit Court; *J. F. Neal*, Judge.

Suit by the Noblesville Monthly Meeting of Friends Church against the Home Savings Association. From a judgment for plaintiff, defendant appeals. *Reversed.*

R. W. McBride, C. S. Denny and *W. A. Bastian*, for appellant.

S. D. Stuart, C. G. Reagan, A. H. Shirts, L. S. Baldwin, J. A. Roberts and *Meade Vestal*, for appellee.

BLACK, P. J.—The appellee sued the appellant, a building and loan association, seeking to have the amount of

a mortgage lien ascertained and adjudged, demanding damages for breach of contract, and asking the quieting of the appellee's title upon payment of the amount found due from the appellee to the appellant. There was an answer in denial, and a cross-complaint seeking foreclosure was filed. No error is assigned relating to the pleadings. The court rendered a special finding, the appellant excepting to the conclusions of law. The appellant's motion for a new trial was overruled, the grounds of the motion insisted upon in this court being the insufficiency of the evidence; that the finding was contrary to law; that the court erred in the assessment of the amount of the recovery, in that the amount found due the appellant was too small; and that the court erred in the assessment of the amount of the recovery, in that it awarded damages to the appellee against the appellant.

The court found, in substance, that, the appellee being a religious corporation and the appellant being a building and loan association, each organized under the laws of the State, the former made application to the latter to become a subscriber to the stock of the association, and to borrow money thereon; that thereupon the parties entered into an agreement that the appellant was to issue sixty-five shares of its stock, of \$100 per share, to the appellee and to lend the appellee \$2,600; that thirty-five of the shares were to be shares commonly called "cash shares," and thirty shares were to be shares commonly called "coupon shares;" that the appellee was to subscribe for sixty-five shares of the stock, and was to execute a bond payable to the appellant in the sum of \$2,600, as evidence of the loan, and was to assign all of the shares to the appellant as security for the sum borrowed; and as further security for the payment of that sum the appellee was to execute to the appellant a mortgage on certain real estate, described, then and still owned by the appellee, and the appellee was to pay to the appellant monthly on the stock and loan, fifty cents per

share upon the cash stock and sixty cents per share upon the coupon stock; and that on account of the excess of stock over and above twenty-six shares, the number of shares representing the loan, the payments so to be made were to be in lieu of and in full payment of the five per cent. premium upon each share for preference and priority in procuring the loan, usually paid by stockholders, and of six per cent. interest per annum upon the loan; and that all the payments were to be made monthly to the appellant's authorized agent at Noblesville, Indiana; and it was further agreed that upon such payment for ninety-eight months upon such cash stock, and ninety-eight payments upon the coupon stock, the loan would be fully paid, and no further payments would be required thereon.

It was further found that, pursuant to these agreements, on March 22, 1897, the appellee subscribed for sixty-five shares of stock in the association, which were duly issued to the appellee by the appellant, and at the same time the appellant loaned the appellee \$2,600, and paid the appellee the full amount thereof, except the sum of \$35.50, the first monthly payment so agreed to be paid, which was retained by the appellant in full of such first payment; and the appellee at the same time pledged the said shares of stock to the appellant, and executed a mortgage upon said real estate, securing the loan, and also signed a bond in the sum of \$2,600 as evidence of the loan; but that by mutual mistake of the parties they used, and the appellee by its trustees signed, a printed bond and mortgage such as were commonly used by the appellant when taking security from stockholders for loans made, but which did not correctly set out the contract so made between the parties as to payments on said stock and loan, but contained many stipulations other than as to such payments and the amount thereof; that the bond contained stipulations as to the payment of premiums on the shares and interest on the loan, neither of which was agreed to by the parties in making

said contract, but which was in said bond through the mutual mistake and inadvertence of the parties in using printed forms of bonds and mortgages commonly used by the appellant in making loans to stockholders; that in pursuance of and in accordance with the actual agreement and contract between the parties, the appellee paid the appellant fourteen monthly payments, including the first payment retained, on the sixty-five shares of stock, of fifty cents per share on each of the thirty-five shares of cash stock and sixty cents per month in coupons on each of the thirty shares of coupon stock, making a total of \$17.50 per month in cash and \$18 per month in coupons—in all \$35.50 per month on said loan; that appellant during this period of fourteen months accepted from the appellee said sum of \$35.50 per month in full of all payments due thereon, and during that period never demanded from the appellee any other or different sum in discharge of its monthly payments on the loan; that upon the fourteenth payment, in April, 1898, the appellant notified the appellee that the association had suspended its business, and that it had decided to wind up its affairs, and would not receive further payments from the appellee in accordance with the terms of the contract or otherwise, and returned to the appellee \$5.54 on account of overpayment on coupon stock and \$4.88 on account of overpayment on cash stock; that the distinguishing feature of the coupon stock was that the association made arrangements with certain merchants in all lines of business in Noblesville and Indianapolis and different towns and cities in which it expected to do business, by which the merchants were to give to their cash purchasers certain coupons prepared and arranged and furnished by the appellant, which represented upon their faces different money values, and were given by the merchants to their cash purchasers in five per cent. of the amount of such purchases; and upon presentation of these coupons to the association by its coupon stockholders it

would honor the coupons at their face value, and give credit to such stockholders upon their coupon stock as cash at such face value, and any number of coupons representing in the aggregate on their face sixty cents in value would pay the amount payable upon such stock for one month; and of the sixty cents per month thus paid on each share of coupon stock the sum of ten cents was deducted by the appellant to pay expenses in collecting coupons from merchants and to pay expenses of issuing the coupons, and of the sixty cents per month thus paid by the appellee the sum of fifty cents only was credited upon the books of the appellant, and of the fifty cents thus credited to the appellee a further sum of ten cents on each share was deducted to pay the ordinary expenses of the association, making a total of such ordinary expenses on the thirty shares of stock of \$3 per month.

It was further found that at, or soon after, the time of the notice of the appellant to the appellee that it would not receive any further payments from the appellee, and after the fourteenth payment was made, and before the fifteenth payment fell due, and notwithstanding such notice, the appellee offered to continue payments upon the stock and loan "in accordance with the terms of their said agreements," but the appellant refused to receive the same, and refused further to carry out the terms of the contract, and demanded the payment in full at once of the entire sum so borrowed, together with a large sum in excess thereof, and was so demanding up to the time of the bringing of this suit; that the appellee was not delinquent in any of its payments, but had fully complied with all the terms of the contract; that the appellee, being a religious organization, had no funds of its own with which to pay the loan, and, in order to meet the payments as they became due, was compelled to distribute and did distribute the payments among the divers members of the church, and by agreement between the parties the members of the church

were to patronize and did patronize the merchants designated by the appellant, and received coupons upon cash purchases as herein described, and turned over such coupons to the association in full of coupon payments and cash for the cash payments, and on account of such agreement the appellant distributed pass-books among such members of the church as had agreed to keep up their respective payments on the loan in such manner, and thus and not otherwise appellee was to keep up and did keep up such payments; that one of the inducements held out by the appellant to induce the appellee to subscribe for the stock and to borrow the money, which was one of the inducements which caused the appellee to subscribe for the stock and to borrow the money, was what was known as the "coupon feature" of the association, heretofore described, by means of which the members of the church could keep up such payments, as they became due, on the coupon stock, without any cash expense upon their part except that of taking coupons when making cash purchases of the merchants; that by the terms of the agreement between the parties, the appellee was to pay the appellant a total sum of \$1,750 in cash in ninety-eight equal monthly instalments, and a total of \$1,728 in coupons in ninety-six [ninety-eight] equal monthly instalments, the same to be in full payment and liquidation of the loan; that the actual amount owing by the appellee to the appellant on account of the loan at and after the time the appellant gave the appellee notice that no more payments would be received, was, and ever since has been, unsettled and in controversy between the parties; that the appellant received said fourteen payments without objection as to the amount being in full of all payments in any way due, both parties during that time in good faith believing that the contract so entered into had been properly and correctly set out in said written agreement.

The court further found, that the appellee had paid the appellant in such monthly payments the total sum of \$102

as dues on the stock, the sum of \$328.21 as premium and interest on the loan, and the sum of \$34.17 expense account, said amounts being credited on the books of the appellant as so much paid by the appellee into said respective funds; that upon calculating interest at the rate of six per cent. upon the loan from the time of receiving it by the appellee, and crediting said payments, exclusive of dues paid, upon the method of partial payments, there was, at the time of receiving said notice, owing by appellee to appellant \$2,400; that appellant was not entitled to recover interest from and after the time it refused the monthly payments; that the appellee had been damaged \$150 by reason of the violation of the contract by the appellant, which should be deducted from said sum of \$2,400, leaving \$2,250 as "the amount which plaintiff now owes defendant;" that the appellant at the time of the institution of this suit was claiming a lien on said real estate by virtue of the mortgage, in a sum largely in excess of the true amount owing the appellant by the appellee; that such claim constituted a cloud upon the title of the real estate adverse to appellee's title; and that the appellee was entitled to have its title quieted against the appellant as to such excessive claim. The court made the bond and mortgage part of its finding by reference to the copies thereof made parts of the pleadings.

The bond was an obligation to pay \$2,600, reciting that the appellee had subscribed for sixty-five shares of stock, of \$100 each, in the association, for which shares it received from the association \$2,600 as a loan, and which shares it thereby transferred as collateral security for the payment of the bond, with agreement on the part of the appellee that it would continue to pay the monthly dues and expenses on the shares of stock at the rate of fifty cents per month on thirty shares and sixty cents per month on thirty-five shares until the shares should mature, at which time all of the loan should become due and payable;

and with the further agreement that appellee should pay a premium of five per cent. per annum upon each share for preference and priority in procuring the loan, and interest at the rate of six per cent. per annum upon the loan, all to be paid monthly, at, etc. The bond was conditioned for the performance of the agreement of the appellee and the payment by it of the monthly dues, expenses, fines, assessments, premiums, and interest until the shares should mature, together with the loan; it being stipulated that upon default in any of the agreements all the loan should become due and payable, and the appellee should forfeit all dues and dividends credited to the shares of stock, and all premiums, fines, and interest it had paid upon the loan, and should pay the association \$2,600 with six per cent. interest and five per cent. premium from the date of the default, etc. The mortgage, as part of its terms, recited the provisions of the bond to secure the payment of which it was given.

The court stated as its conclusions of law, that the appellee was liable to the appellant in the amount of money borrowed, with six per cent. interest from the time it was paid to appellee until the appellant gave notice that no further monthly payments would be received, and was entitled to monthly credits as partial payments thereon in the total monthly amounts paid as premiums, interest, or expense account; that the appellee was not entitled to any credits on the loan by reason of the amount of dues paid; that there was owing the appellant by the appellee at the date of the refusal to receive further payments \$2,400; that the appellee was entitled to recover damages of the appellant for violation of the contract by the appellant, as found by the court, \$150, and was entitled to have this sum set off against the amount owing to the appellant; that the appellant was not entitled to interest from the time of giving said notice that it would not receive monthly payments until the date of the finding; that there was owing to the appellant by

the appellee \$2,250; that the appellee was entitled to have its title quieted to the real estate in question as to any claim of the appellant in excess of \$2,250; and that the appellee should recover costs, and the appellant should take nothing by its cross-complaint to foreclose the mortgage.

Where a building and loan association has become insolvent, and a receiver has been appointed to wind up its business, the incapacity of the association to perform its contract with a borrowing member relieves the latter of his obligation to continue to make his periodical payments according to the contract, and all members are relieved from the payment of dues, and the amount for which the borrowing member is liable is determined upon the equitable principle of adjusting the losses with equality among the stockholders, and not by the terms of the contract, which is treated as abrogated. In such case, the borrowing member is bound to pay the amount borrowed by him, with interest thereon at the rate fixed by statute for the loan or forbearance of money when no rate has been fixed by contract, less deductions, which have varied in different jurisdictions. The rule adopted in this State as being most equitable concerning these deductions is, that the borrowing member so charged with the amount of his loan and such interest thereon (at six per cent. per annum) shall be allowed as credit thereon all the interest that he has paid upon the loan in periodical instalments and all the premiums paid by him as a borrower, such amounts being credited as partial payments upon the debt for money had and received; but the dues paid periodically on the pledged shares of stock by the borrower in his capacity of stockholder are not treated as partial payments on the loan, and are not deducted from the amount of the loan. *Marion Trust Co. v. Trustees Edwards Lodge*, 153 Ind. 96; *Huter v. Union Trust Co.*, 153 Ind. 204; *James v. Sidwell*, 153 Ind. 697; *MacMurray v. Sidwell*, 155 Ind. 560, 80 Am. St. 255; *Columbia Finance, etc., Co. v. Tharp*, 24 Ind. App. 82; *Boice v.*

Rabb, 24 Ind. App. 368; *Bingham v. Marion Trust Co.*, 27 Ind. App. 247. To give the borrowing member credit upon his mortgage for his payments of such dues upon his stock would enable him to escape responsibility for his proper share of the losses, which would thus be thrown upon the non-borrowing members.

The value of the stock can not be ascertained until the affairs of the association are so far adjusted and wound up as to obtain a basis for calculation. The borrowing member will be entitled, after the debts are paid, to a pro rata dividend with the non-borrowing members for what he has paid as dues on his stock. Also, where a building and loan association has gone into voluntary liquidation, in a suit by a borrowing member to quiet title to the mortgaged premises, she having tendered and brought into court the amount admitted by her to be due upon her note, after referring to the rule as above indicated for adjustment of the borrowing member's liability in case of an insolvent association in the hands of a receiver, the court said: "The consequences of a winding up of a solvent association by a voluntary liquidation are quite as fatal to the expected advantages of the investment and loan as if the business of the corporation were brought to a standstill by insolvency. A loss of a proportionate share of the prospective profits by the borrowing member is the necessary result of the final suspension of the business of the association." *Fidelity Building, etc., Union v. Smith*, 155 Ind. 679. And it was held that in such case, the objects for which the association was organized having been abandoned, the borrowing members were released from their obligations to continue the periodical payments under the contract. The same equitable rule of adjustment as in case of an insolvent association was recognized; and as to payments made by the plaintiff after the association went into liquidation, including interest, premium, and dues, she was entitled to have them all applied on her debt. In such case the con-

tract is abrogated, and the parties cease to be controlled by its provisions. The advantage contemplated, of eventually paying off the loan by the small periodical instalments and the profits from the accumulation of the business of the association, having been rendered impossible of attainment by the borrowing member, he could not equitably be required to continue to make such payments as specified in the contract. As a borrower of money, he should be required to pay it, and can not rightfully have his land released from the lien of the lender thereon without repayment of the money so had and received. The interest, as well as the premium, stipulated in the contract, can not equitably be exacted, because of the failure of the peculiar consideration therefor; but the borrower ought to pay such interest as the law exacts, in the absence of a special contract, for the use of the money.

In this case the court did not make any disposition of the share of interest in the assets of the association of the appellee as a stockholder, it being the apparent expectation that the appellee eventually, upon the payment of the debts of the association and the adjustment of the rights of the stockholders among themselves, will derive any benefit to which it may be entitled from its payment of dues as a stockholder by receiving a pro rata dividend, if any, with the borrowers and non-borrowers.

If the affairs of the association were in the hands of a receiver, a party to the proceeding, there would seem to be no good reason why the present value of the borrower's shares of stock could not be ascertained and applied as a credit upon the loan; at least if so desired by the debtor. Perhaps, also, in such a case, brought against an association in liquidation, if the affairs of the association were in a condition admitting of the ascertainment of the pro rata share of the plaintiff in the assets on final distribution with sufficient certainty, and the plaintiff desired the application of such value of his stock upon his debt, it

would not be improper so to proceed to make an end of the matter in the manner above suggested in case of a receivership. The action here is between the borrower and the association, initiated by the borrower, asking to have the amount due from it on its loan ascertained and adjudicated, and to have its title quieted upon payment of that amount, with no request to have the value of the shares of stock ascertained, and applied to the appellee's credit; such matter, being left, apparently, to the future adjustment of the affairs of the association among the stockholders.

The condition created by the action of the association, detailed in the finding, was treated by the court as equivalent, in effect, to a complete suspension or dissolution of the association, and the appellee, in its character of borrower, was left in the situation of a borrower whose loan was secured by mortgage on his land; but the peculiar obligations which would have rested upon him as a borrowing member in default of a solvent, going association, itself not in default, were treated as abrogated, and he was held liable for the money actually received by him, with six per cent. interest thereon, and entitled to be credited with the instalments of interest and premium paid by him as partial payments as of the date of payment. He would, also, be entitled to share pro rata with the stockholders on final adjustment and distribution of the assets remaining after the payment of debts.

It does not clearly appear from the finding that the association is insolvent, or in process of liquidation, and we can not treat the evidence as properly before us for examination; for, if it may be said that the bill of exceptions containing the evidence is in the record, the appellant has failed to comply with the rule of court in relation to marginal notes in the bill.

The association's ordinary blank forms of bond and mortgage appear to have been used, without alteration, to carry into execution the arrangement agreed upon by the parties,

who understood such purpose to be thereby effectuated; and for more than a year both parties carried such arrangement into effect, and by their conduct indicated their understanding of the contract. During that long period a certain amount, being the aggregate of the dues specified in the written instruments, was paid and accepted and distributed to the various funds of the association. After such practical construction of the contract by the parties for so long a period, it would seem that the appellant's subsequent insistence upon the adoption of the language of the written instruments so far as they were in disagreement with that construction would be so inequitable as to amount to a fraud against the appellee.

If it be true that the appellant at the time of the trial was a solvent association, not in course of liquidation, the conduct of the appellant, shown by the finding, in notifying the appellee that the association had suspended its business, and had decided to wind up its affairs, and would not receive further payments in accordance with the contract or otherwise, and in returning money which had been paid in by the appellee as being overpayment, and in refusing afterward to receive further payments offered by the appellee, and refusing to carry out further the terms of the contract, and demanding payment in full of the amount borrowed, with a large sum in excess thereof—the appellee having fully complied with the contract except as so prevented—would be a sufficient reason for a demand on the part of the appellee for the adjustment of the account between the parties, on the theory that the contract had been so far abrogated by the wrong of the association that the parties should be remitted to the relation of one indebted to another for money had and received, the mortgage lien still existing; and in such case it would seem that in the adjustment of the amount due the present accrued value of the stock ought to be ascertained and deducted from the amount, as well as the interest and premium paid, and that

the lien should be enforced for the balance. On this question, however, the case does not require a decision. While there is some obscurity, the court seems to have proceeded upon the theory—possibly supported sufficiently by evidence—that the association was actually in the course of liquidation, and treated the case as one wherein it was proper to leave the value of the stock out of consideration.

The court recognized and applied the theory practically applied by the appellant to the contract relation of the parties, from the beginning of that relation until the enforced cessation thereof, by apportioning the aggregate payments, which were made and accepted without objection, among the several funds, applying a portion with reference to one class of stock by distributing it as stock dues and as interest and premium, and applying another portion with reference to the other class of stock by distributing it as stock dues, expenses, and interest, and premium. The appellant could have no well founded objection to the action of the court in treating the contract as it had always been treated by the appellant.

But the matters considerably discussed by counsel relating to the question as to the true character of the contract, whether it was correctly represented by the terms of the written instrument, or was such as was indicated by the conduct of the parties in carrying this contract into effect for fourteen months, becomes of no consequence, in view of the fact that whatever its character as a contract between a building and loan association and its borrowing member, its peculiar and characteristic stipulations concerning the loan must be treated as abrogated, and the parties must be regarded as remitted to the simple relation above indicated.

We can not reconcile with accepted principles the award of damages in the sum of \$150 because of the supposed loss to the appellee through its deprivation of the advantages which would have accrued from the continued carry-

ing out of the contract by reason of the convenient methods provided therein for paying dues on its stock.

Under the decision reached by the trial court the appellee was not deprived of its rights growing out of its ownership of that stock, but was left to take, pro rata with other stockholders, any benefit derivable from the payment of dues thereon. The whole benefit claimed by the appellee and awarded to it by way of being relieved from payments pursuant to the contract and being permitted to repay the money received, with legal interest, and of receiving credit on the loan for all partial payments, presupposes such abrogation of the contract as would be inconsistent with the award of damages for the loss of such benefit expectant upon the fulfilment of the contract according to its terms. In connection with such acceptance of the abandonment of the contract rights and obligations, the appellee can not be thus awarded damages as for the breach of the contract.

The appellee has sought a remedy incompatible with recovery of damages for such a loss, which would involve the recognition of the vitality of the contract, which, upon the principles applicable to the situation, must be regarded as abrogated, the parties having to each other, with reference to the loan, the relation of a debtor owing for money had and received to a creditor holding a lien on the land of the former, while as to the coupon stock in question the appellee continues to have such interest in the assets of the association as belong to all the other holders of such stock. Being thus remitted to the relation of debtor and creditor, the former owing the latter simply the amount of money actually received, with interest thereon, we see no sufficient reason why the obligation for interest should not extend to the time of the rendition of the finding, as in other cases where such relation exists, and there has been no tender, kept good by bringing the money into court; and in this respect, also, we are unable to uphold the court's conclu-

sions. See *Hinman v. Ryan*, 3 Ohio C. C. 529; *Twin Cities, etc., Assn. v. Lepore*, 17 Pa. Co. C. 426.

The court not only concluded that the appellee was entitled to credit for the instalments of interest and premium paid, but also treated the amounts paid and apportioned to the expense account as partial payments on the debt. We think, however, that the borrowing member was not entitled to credit, except for the payments which he made in the character of borrower, and that the sums appropriated to the expense fund should have been classed with those denominated in the finding as "dues," and as to such payments the appellee should stand in the situation occupied by all shareholders, whether borrowing members or investing members of the association. The amounts appropriated to expenses were devoted to the maintenance of the association, and by the payment thereof the interests of all the stockholders, as such, were conserved; and such contributions were incidental to the holding of the coupon stock, and not to the advancement of the loan.

We are of the opinion that in such a case as this the court should designate a period, such as it may regard as reasonable, within which the plaintiff shall pay in to the clerk the amount determined to be due from the plaintiff, and should provide for the enforcement of the lien by sale of the land upon failure to make such payment within the prescribed period.

The special finding does not state the facts with such particularity and certainty as to furnish a basis for the correction of the conclusions of law so as to make them agree with the views expressed by us in this opinion.

The judgment is reversed, and the cause is remanded for a new trial.

COOMBS v. JEFFERSON TOWNSHIP.

[No. 4,395. Filed May 15, 1903.]

TOWNSHIP TRUSTEE.—*Issue of Warrants for Money Borrowed.*—*Statutes.*—*Repeal.*—Sections 8081, 8082 Burns 1901, providing that a township trustee shall procure an order from the board of county commissioners therefor before incurring a debt in excess of the particular fund on hand and to be derived from the tax assessed for the year in which the debt is to be incurred, was not repealed by the act of 1897 (Acts 1897, p. 222), and township warrants issued by a township trustee for money borrowed, without complying with the provisions of said statute, can not be enforced against the township.

From Boone Circuit Court; *B. S. Higgins*, Judge.

Action by Margaret Coombs against Jefferson Township, Boone county. From a judgment for defendant, plaintiff appeals. *Affirmed.*

C. M. Zion, for appellant.

T. J. Terhune and *Reed Holloman*, for appellee.

ROBINSON, J.—Suit by appellant upon two township warrants issued for money borrowed. The act of August 24, 1875 (Acts 1875, p. 162, §§8081, 8082 Burns 1901), provides, that whenever it becomes necessary for a township trustee to incur a debt on behalf of his township in excess of the particular fund on hand and to be derived from the tax assessed for the year in which the debt is to be incurred, he shall procure an order from the board of county commissioners authorizing him to contract such indebtedness; such order to be made by the board upon petition and notice by the trustee stating the object of the debt and the approximate amount required. An act approved March 8, 1897 (Acts 1897, p. 222), entitled "An act prescribing certain duties of township trustees, providing for the appointment and compensation of an auditing board, prescribing its duties and declaring an emergency," made

the board of county commissioners an auditing board to audit the warrants drawn by township trustees, and provided that "It shall be the duty of said board to investigate and learn for what purpose said warrant is drawn, whether or not it is a proper and reasonable charge against any of the funds of said township, whether or not the article for which any such warrant is drawn is a proper and legitimate purchase of said township, or whether or not said township had use therefor, and whether or not the amount named in any warrant is a reasonable compensation for the article furnished or labor or service performed, or whether or not there was any occasion for the purchase of or contracting for said article, or the procurement of said labor and services, and said board shall audit said amounts and determine what warrants shall be issued by said several trustees and for what amounts and shall write or stamp on the face of each warrant that it audited and approved the amount for which allowed, and which shall be signed by the president and secretary of said board." The act also provides that any taxpayer may except to the auditing of any warrant, in whole or in part, the registering of all warrants by the board, a report of rejected and protested warrants to the circuit court, and a hearing thereon, a penalty for the unlawful delivery of warrants, and repeals "all laws and parts of laws in conflict with the provisions of this act." The act of March 8, 1897, *supra*, was expressly repealed by an act approved February 27, 1899 (Acts 1899, p. 150), but the act was in force when the warrants in question in this suit were issued.

Whether the trial court erred, as claimed by appellant, depends upon whether the act of 1875 was repealed by the act of 1897. If it was repealed, the judgment must be reversed; otherwise affirmed. In contracting the loan, no attempt was made to comply with the act of 1875. The act of 1897 is not an amendatory act. It does not purport to amend or to continue in force any former act, but is an

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independent act, introducing new and distinct provisions concerning a certain subject-matter. It did not expressly and in terms repeal the older law. If it did, there would be nothing for the court to do but accept the legislative declaration, and treat the old law as no longer in force. It did, in terms, repeal all former acts that were in conflict with its provisions, but whether there is a conflict is a question that the courts must determine. It can not be said that this general repealing clause expressed the intention of the legislature to repeal all former statutes relating to the same subject-matter. It repeals nothing except what is in conflict with the provisions of the later act. If the subject-matter of the two acts is the same, and there is a conflict, the later act controls, because of the doctrine that the last expressed will of the legislature on any given subject must prevail. So that the repealing effect of the act of 1897 is none the greater by reason of this general repealing clause, for the reason that, with or without such a repealing clause, the courts must determine whether there is a conflict, and, if there is, to what extent the older law is superseded by the later act. It is the duty of the court to determine any conflict between an older and a later statute on the same subject-matter in favor of the later act, whether the legislature has said that the later act shall control or not. And the general repealing clause in the act of 1897 says nothing more than that its provisions shall control over any former act that conflicts with it.

The repeal of statutes by implication is not favored, and it is only when there is a full and plain conflict that the earlier statute will be held to be repealed. Where there are two statutes on the same subject, both will be upheld, and construed *in pari materia*, if it can be reasonably done. *City of Madison v. Smith*, 83 Ind. 502; *Wright v. Board, etc.*, 82 Ind. 335; *Pomeroy v. Beach*, 149 Ind. 511; *Black, Inter. of Laws*, 112; *Sosat v. State*, 2 Ind. App. 586.

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The provisions of the act of 1875 are not necessarily in conflict with the provisions of the act of 1897, nor can it be said that the later act covers the same subject-matter as the older law. The act of 1897 was manifestly intended to apply to warrants issued for articles purchased and labor or service performed for the township. Nothing is said in the act about warrants issued for money borrowed. It is true, the act of 1875 does not relate exclusively to borrowing money, but it does include that subject-matter. That act very wisely provides that before a trustee can contract an indebtedness on behalf of his township in excess of the particular fund on hand and to be derived from the tax assessed for the year in which the debt is to be incurred, he shall procure an order from the board, upon petition stating the object for which the debt is to be incurred and the approximate amount required, and shall give notice of the pendency of this petition. This provision for notice to the taxpayers of the township that a matter which concerns them will come up for hearing at a certain time is not contained in the act of 1897. It is true, a taxpayer, if he chanced to learn of the fact, might appear before the auditing board, under the act of 1897, and except to the auditing of any warrant creating a debt against his township in excess of the funds on hand and to be derived from the tax assessed for the particular year, but no provision is made for any notice that any such warrant will be presented for auditing. The debt contracted under the act of 1875 is to be paid from funds to be derived from a tax not yet levied, and the safeguards thrown about the contraction of such a debt are not contained in the later act. The act of the trustee in issuing a warrant under the provisions of the older law would in no sense interfere with any duty required of the auditing board under the provisions of the later law. The only duty of the auditing board in reference to a warrant so issued would be to approve it and cause it to be properly registered. The act of 1897

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includes any warrant issued by the trustee, without reference to the condition of the fund against which the warrant is drawn; but, as its provisions are not inconsistent with the older law, they may both consistently stand together and should be construed *in pari materia*.

Judgment affirmed.

**PARKINSON, TREASURER, ET AL. v. JASPER COUNTY
TELEPHONE COMPANY.**

[No. 4,781. Filed May 19, 1903.]

TAXATION.—Omitted Property.—Corporations.—Neither the county board of review nor the state board of tax commissioners have authority to reassess property assessed in previous years because of undervaluation in such previous years, nor to make an original assessment of property for previous years, as property omitted from taxation in such years, nor to increase the assessment of property for the current year because of omissions of previous years. *pp. 144, 145.*

SAME.—Telephone Companies.—The scheme of taxation of telephone companies contemplates that the real estate, structures, machinery, fixtures, and appliances owned by the company shall be originally assessed by the local officials, and that such assessments may be reviewed, and property of such description omitted in the current year may be added by the county board of review, and that the remainder of the property, coming within the meaning of capital stock, shall be assessed by the state board by determining its value, and adding thereto the mortgage indebtedness, and from the amount so obtained subtracting the value of such tangible property locally assessed; the remainder being taken as the value of the capital stock to be assessed by the state board; and if such tangible property has been omitted from local assessment and taxation for previous years, it is the duty of the local officials to assess such property so omitted, and to place it on the tax duplicates. *pp. 145, 146.*

INJUNCTION.—Complaint.—Taxation.—A complaint by a telephone company to enjoin the collection of taxes locally assessed is insufficient unless all of the taxes sought to be enjoined are invalid. *p. 146.*

From White Circuit Court; *T. F. Palmer*, Judge.

Suit by the Jasper County Telephone Company against Robert A. Parkinson, treasurer of Jasper county, and

others. From a judgment in favor of plaintiff, defendants appeal. *Reversed.*

E. B. Sellers, for appellants.

Frank Foltz, *C. G. Spitler* and *H. R. Kurrie*, for appellee.

BLACK, P. J.—A demurrer for want of facts to the appellee's amended complaint was overruled, and a demurrer to the answer of the appellants, the treasurer, the auditor, and the assessor of Jasper county, was sustained.

The complaint showed that the appellee, a corporation organized under the laws of this State, owning and operating a telephone system in different counties of this State, in each of the years of 1896, 1897, and 1898, furnished to the Auditor of State a statement of its assets for taxation, in which, amongst other things detailed in the pleading, it was shown that in those years it had no property outside of this State, and that none of its property was assessed locally for taxation, except that in 1897 and in 1898 there was a local assessment for taxes on its office furniture of \$50; that these statements were true; that the state board of tax commissioners, in regular session in each of those years, from such statements and such other evidence as it heard, ascertained the value of all the assets of the appellee for the purpose of taxation, and the value so ascertained was divided among the different townships, cities, and towns, according to mileage, and before the bringing of this suit all the taxes so assessed had been paid by the appellee; that May 10, 1899, the county assessor of Jasper county, after notice to the appellee, filed in the office of the county auditor certain assessments of property of the appellee alleged to have been omitted from its assessments for 1896, 1897, and 1898; the property thus reported being telephone instruments in several townships of Jasper county, a switchboard in the city of Rensselaer, a franchise,—being the grant to use the streets and alleys

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of that city for the appellee's lines,—and the capital stock over and above the value of the tangible property; the report showing the assessor's valuation as to each item of the property so reported. The county auditor, it was alleged, entered the property so reported, at such valuations, on the tax duplicates for those years, against the appellee, and the taxes so entered remained unpaid. It was further alleged that at the regular meeting in 1899 of the state board of tax commissioners, the appellee presented the matter of such assessments on account of alleged omissions, and that board found and entered of record an order as follows: "In the matter of the petition of the Jasper County Telephone Company for a modification of the assessments of the said company as fixed by the board during the first twenty days of its present session, it is ordered that the assessment of the Jasper County Telephone Company be fixed at \$175 a mile. This assessment is intended to be, and is, total, and covers all the company's property liable to assessment, except office furniture such as tables and chairs, and horses and wagons, which are of a distinctly local character, and are to be assessed by the local officials; and the county auditor is hereby directed to take from the duplicate any assessment heretofore made on pole or wire mileage, telephones, switchboards, and batteries of the said company." It was alleged that the appellants each were notified of this order, but refused to comply with it; that the assessment so made by the state board was fixed at the amount stated on account of such alleged omission; that it included all omissions and other charges for taxes against the appellee for each year up to and including 1899; and that all said taxes have been paid. It was also alleged that the true value of all the assessed property, rights, choses, and franchises of the appellee during each of the years 1896, 1897, and 1898, was represented by its capital stock, the actual value of which was set forth in the statement furnished each year by the appellee as above

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mentioned, and that the assessment of the state board during each of those years was upon and covered and included all property, franchises, choses, rights, assets, and privileges of the appellee, during each of those years, and the entire system and assets of the appellee, and no part thereof was omitted from such valuation; and the act of the county assessor and county auditor in assessing such property as omitted was only a revaluation of the property of the appellee which already had been valued for assessment during each of those years. It was shown that the treasurer was threatening, etc., and the appellee prayed for an injunction, etc.

In the answer it was alleged that in 1896 the state board assessed the lines of the appellee upon the basis of the value of its capital stock, after deducting the value for taxation of the telephones, switchboard, and the Rensselaer franchise, and fixed the value of the mileage at \$25 per mile; whereas, if such property had been considered and included, the value would have been \$75 per mile, and the state board omitted such property from the levy, and it was not assessed for taxation in that year; that in 1897 and 1898 the state board in fixing the assessment deducted from the value of the capital stock, as it found it, the value of a specified number of telephones, a switchboard, and the Rensselaer franchise, and did not include for taxation these items of property, and they were not assessed for taxation for that year by any officer of Jasper county, but wholly escaped taxation, and the only property locally assessed for taxation in Jasper county in 1897 and 1898 was the office furniture, which each year was assessed at \$50. The cash values of the appellee's telephones in Jasper county and of the switchboard, on April 1, 1896, 1897, and 1898, were stated, and it was alleged that the appellee "did not list the said property anywhere for taxation in said years."

The complaint is somewhat obscure and its averments are apparently contradictory. While there seems to be an

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intention to assert that in 1896, 1897, and 1898, all the property of the appellee was assessed by the state board, except that the office furniture was not so assessed in 1897 and 1898, yet it is to be gathered from the complaint that the state board's assessment of 1899 included omitted property not assessed in the former years; being the property, in part, which had been assessed in 1899 by the local officers as omitted property. The answer shows that in the assessments by the state board for those three years, respectively, the value for taxation of the telephones, switchboard, and franchise was deducted from the value of the capital stock. As to the local assessment in 1899 of the capital stock, the answer does not attempt to excuse it; and the appellants, in their brief, admit that in attempting to assess the capital stock the county auditor "possibly erred."

The scheme of taxation provided by our statutes manifestly contemplates assessment for taxation of all the property of the corporation. In §12 of the act of 1891 (Acts 1891, p. 199, §8422 Burns 1901), concerning taxation, it is provided that all the corporate property, including capital stock and franchises, except where some other provision is made by law, shall be assessed to the corporation as to a natural person, in the name of the corporation. In §25 of the same act (§8435 Burns 1901), it is provided that every franchise granted by any law of this State, owned or used by any person or corporation, and every franchise or privilege used or enjoyed by any person or corporation, shall be listed and assessed as personal property. By §53, as amended in 1895 (Acts 1895, p. 21), the schedule to be used by the county officers for local taxation was to contain among its items of property to be assessed: "22. Value of property of companies and corporations other than property hereinbefore enumerated." "27. Every franchise and description and value." In §§73 and 74 (§§8491, 8492 Burns 1901) of the act of 1891, provision is made, in addition to the other property required by the

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statute to be listed, for a statement to be furnished by certain corporations, other than telephone companies, and for the valuation and assessment by the county board of review of "the capital stock and all franchises and privileges" of such corporations. It is there indicated that in assessing the capital stock the value of the tangible property is not to be regarded as included in the value of the capital stock, if any tangible property is returned or found, but in such case the tangible property is to be assessed separately from the capital stock. In the same connection it is provided that every franchise or privilege of such corporation is likewise to be assessed by the county board of review at its true cash value, and that, where the full value of any franchise is represented by the capital stock listed for taxation, then the franchise shall not itself be taxed; but where the franchise is of greater value than the capital stock, then the franchise shall be assessed at its full cash value and the capital stock in such case shall not be assessed. Thus, while the capital stock of such a corporation and the value of every franchise must each be included in the statement so to be furnished to the assessor, and every franchise must be assessed, a franchise so reported is not to be taxed separately if its value be represented by the capital stock listed; but if the value of the franchise be not represented by the capital stock listed, and be not greater than the capital stock, it is to be assessed separately from the capital stock.

By a statute of 1893, supplementary to and amendatory of the act of 1891, provision is made for the taxation of specified corporations—among them telephone companies. Acts 1893, p. 375, §8479 Burns 1901. It is thereby provided that every telephone company doing business in this State shall deliver to the Auditor of State a verified statement with reference to the 1st day of April next preceding (being such a statement as was furnished by the appellee), showing (1) the total capital stock of the corporation; (2) the number of shares thereof issued and outstanding, and

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the par or face value of each share; (3) its principal place of business; (4) the market value of the shares of stock on the 1st day of April next preceding, and, if they have no market value, then the actual value; (5) the real estate, structures, machinery, fixtures, and appliances owned by the corporation, and subject to local taxation within the State, and the location and assessed value thereof in each county or township where the same is assessed for local taxation; (6) the specific real estate, together with the improvements thereon, owned by the corporation, situated outside this State, etc.; (7) all mortgages upon the whole or any part of its property, together with the dates and amounts thereof; (8) (a) the total length of the lines of the corporation; (b) the total length of the lines outside this State; (c) the length of the lines within each of the counties and townships in this State. In the statement furnished by the appellee under this statute in 1896, it did not include any property under the fifth item, which relates wholly to tangible property, and in 1897 and 1898, it reported under that head its office furniture at a designated valuation. It was not required to show specifically in these statements its franchises, or the value thereof, and it did not do so. By §§6 and 7 of this statute of 1893, provision was made for the valuation and assessment by the state board of tax commissioners of the property of such a corporation, at its meeting for the purpose of assessing railroad and other property. Omitting provisions not applicable to the case before us, the method prescribed for the state board required it first to ascertain the true cash value of the entire property owned by the appellee, for that purpose taking the aggregate value of all the shares of capital stock if they had a market value, and the actual value if they had no market value. If the property, or any portion of it, was encumbered by mortgage, the board was to ascertain the true cash value of the property of the corporation by adding to the value of the shares of stock

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the amount of the mortgage or mortgages; the result of such addition to be deemed and treated as the true cash value of the property of the corporation. From the entire value so ascertained the state board was required to deduct the assessed value for taxation of all the real estate, structures, machinery, fixtures, and appliances, owned by the corporation within this State, and the residue of such value so ascertained, after deducting therefrom the assessed value of such local properties, was to be by the state board assessed to the appellee.

The board was required to ascertain the value of the property of the corporation from its statement submitted to the Auditor of State, and from such other information as it might have or obtain; having authority to require the agents or officers of the corporation to appear before the board, with such books, papers, or statements as the board might require, and to require additional statements to be made to the board, and to compel the attendance of witnesses, if deemed necessary by the board, to enable it to ascertain the true cash value of the property.

The county auditor, by §§9 and 10 of that statute, was required to apportion the amount of taxes certified to him by the Auditor of State among the several townships into which the lines of the company extended, in proportion to the length of the lines in the townships, and to add to the value so apportioned the assessed valuation of the real estate, structures, machinery, fixtures, and appliances situated in any township, and to extend the taxes thereon upon the duplicates as in other cases.

In §129 of the act of 1891, *supra*, as amended in 1895 (Acts 1895, p. 74, §8547 Burns 1901), provision is made for a meeting of the state board in July of each year to assess railroad property and all property belonging to certain classes of owners, including telephone companies, transacting business in this State; the time of the meeting for such purpose not to exceed twenty days. Provision is

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there made for the reconvening of the board to hear appeals, and also applications for revision of assessments, which by law it is required or permitted to make, and for the equalization of assessments of real estate. After this session for hearing appeals and applications for revision of its assessments, and the equalization of real estate assessments, it is required to convene again to hear complaints or applications for change in the assessment, made by the owners of railroad property, and all other persons, corporations, etc., whose assessments have been fixed at the first session. The state board is given all powers given to county boards of review. It is not bound by any reports or estimates of property as returned to county auditors or to the Auditor of State, or certified to the latter in connection with appeals or applications for revision, review, or assessment, but is to appraise and assess all property coming before it for assessment, directly or indirectly, at its cash value; having power to send for persons, books, and papers, and to examine records, and to hear and question witnesses.

Sections 114 and 115 of the act of 1891 (Acts 1891, p. 199) as amended in 1895 (Acts 1895, p. 74, §§8532, 8533 Burns 1901), prescribing the powers and duties of the county board of review, provide for the addition by that board of property omitted from the list of that year, but do not provide for adding property omitted in other years.

By §125 of the act of 1891, as amended in 1895 (§8543 Burns 1901), appeals may be taken to the state board from the county board of review from (amongst other matters) an order for the assessment of hidden or omitted property, and it is provided that the state board may make such regulations in regard to the taking of appeals, "not inconsistent herewith," as they may deem necessary to protect the rights of the parties questioning their assessments, and that, upon appeal from an assessment by the party aggrieved, the state board shall assess the property in con-

troversy, and the Auditor of State shall certify all such changes made by the state board, showing the assessment made by the county or township officials and that made by the state board, which latter amounts shall be by the county auditor extended on the tax duplicates in lieu of the amounts fixed by the township or county officials, or by the county board of review.

The provision of the statute conferring upon the state board the powers possessed by the county boards of review were intended to confer such power in cases where the state board had jurisdiction, either original or appellate, and not to confer original jurisdiction over all the property of the State. *Jones v. Rushville Nat. Bank*, 138 Ind. 87; *Cummings v. Stark*, 138 Ind. 94; *Eaton v. Union County Nat. Bank*, 141 Ind. 136.

Authority to assess property because of its omission from taxation in previous years must be derived from the terms of some statute considered according to its meaning, and the intent of the legislature shown thereby. If the language employed may be construed as relating to assessments for the current year only, it will not be extended to embrace the special and exceptional assessment of property omitted in previous years. See *State, ex rel., v. Howard*, 80 Ind. 466; *Stockman v. Robbins*, 80 Ind. 195; *Scott v. Town of Knightstown*, 84 Ind. 108; *Hamilton v. Amsden*, 88 Ind. 304; *Lang v. Clapp*, 103 Ind. 17.

The county board of review had power to add omitted property, but only property omitted from the lists of the current year. Neither the county board nor the state board appears to have authority to reassess property assessed in previous years because of undervaluation in such previous years; and we are unable to find any statutory provision authorizing the state board to make an original assessment of property for previous years, as property omitted from taxation in such years, or to increase the assessment of

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property for the current year because of omissions of previous years.

The scheme of taxation provided for telephone companies seems to contemplate that certain parts of their property—those designated in the fifth clause of §8479 Burns 1901—shall be originally assessed by the local officials, and that such assessments may be reviewed, and property of such description omitted in the current year may be added, by the county board of review, and that the remainder of the property, coming within the meaning of capital stock, shall be assessed by the state board, by determining its value and adding thereto the mortgage indebtedness, and from the amount so obtained subtracting the value of such tangible property locally assessed; the remainder being taken as the value of the capital stock to be assessed by the state board. If any such tangible property has, in fact, been omitted from local assessment and taxation for previous years, it is the duty of the local officials, under statutes giving them ample authority for the assessment of omitted property, to assess such property so omitted, and to place it on the tax duplicates.

All the franchises of the corporation are to be assessed for taxation. In the case of telephone companies, the corporation is not required to mention its franchises specifically in the statement to be furnished to the Auditor of State as the basis of the action of the state board, and it seems to be contemplated by the statute that the franchises of such a company are to be regarded as represented by the capital stock; and we are inclined to the opinion that, when the state board has assessed the capital stock, the franchises of the corporation are to be regarded as having been included in the assessment, though doubtless the contrary may be shown on a review by the state board of its first assessment of the current year. However this may be, it seems to be

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sufficiently indicated that the franchises of such company are not to be assessed by the local officials, either for the current year or for previous years; and that they can not properly be assessed by the state board for previous years.

The complaint of the appellee can not be considered sufficient, unless all of the taxes which it is sought thereby to enjoin be invalid. We do not conceive that the question is here necessarily involved as to whether telephone instruments and switchboards of a telephone company may properly be regarded by the state board as property to be included in determining the taxable value of the capital stock for the current year, when such tangible property is not locally assessed, or may properly be assessed for taxation only by the local officials. The case before us rather presents an instance where such tangible property, capable of identification by the local authorities, was not listed, assessed, or taxed in previous years in any manner, and has been placed upon the tax duplicate as omitted property for such years by the local officers, no other officials having authority thus to enforce taxation of such tangible specific property for previous years; and we are of the opinion that for the taxes on such omitted tangible property the appellee is liable.

Judgment reversed, with instruction to sustain the demurrer to the complaint.

THOMAS v. DABBLEMONT, ADMINISTRATRIX.

[No. 4,416. Filed May 20, 1903.]

PHYSICIANS.—Malpractice.—Assault.—Joinder of Causes.—In an action against a physician for malpractice, damages for assault may be demanded in a separate paragraph of complaint. *p. 148.*

WITNESSES.—Cross-Examination.—Malpractice.—In an action against a physician for malpractice the defendant in his examination in chief testified as to the physical condition of plaintiff and that he gave her the proper remedies. *Held*, that it was proper on cross-examination to require defendant to testify as to the kind of medicines he administered *pp. 148 149.*

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EVIDENCE.—*Expert Testimony.*—*Hypothetical Question.*—*Harmless Error.*

—The embracing in a hypothetical question of assumed facts that were without support in the evidence, is harmless, where the court instructed the jury that the value of the opinion given by an expert upon a hypothetical question must depend upon the facts proved which are embraced in the question. *p. 149.*

PHYSICIANS.—*Skill Required.*—*Malpractice.*—A physician is bound to possess and exercise only the average degree of skill possessed and exercised by members of the medical profession practicing in similar localities. *p. 150.*

From Sullivan Circuit Court; *O. B. Harris*, Judge.

Action by Lizzie Souter by next friend, against George A. Thomas. From a judgment for plaintiff, defendant appeals. *Reversed.*

G. W. Buff and *J. S. Bays*, for appellant.

J. A. Riddle and *Seymour Riddle*, for appellee.

COMSTOCK, J.—Lizzie Souter, by her next friend, commenced this action against the appellant, a physician, to recover damages for alleged malpractice of appellant in the treatment of said Lizzie during her sickness. The action was begun in the Greene, and tried in the Sullivan Circuit Court, upon change of venue. The trial resulted in a verdict against appellant for \$700. His motion for a new trial was overruled, and judgment rendered on the verdict. Before the appeal was perfected, Lizzie Souter died, and appellee Dabblemont was appointed administratrix of her estate. The transcript was subsequently filed in this court, and notice given appellee.

Appellant assigns as error: (1) The action of the court in overruling appellant's motion to make the complaint more specific; (2) and (5) in overruling appellant's motion to require plaintiff to separate her causes of action; (3) in overruling appellant's demurrer to each paragraph of the complaint; (4) in permitting plaintiff to file second paragraph of complaint; (6) in overruling appellant's motion for a new trial.

The complaint was in two paragraphs. To each a general denial was filed. The first paragraph charged unskilful treatment by appellant; that he exposed her to cold and inclement weather, made improper proposals to her, and, against her will, took indecent liberties with her person. The second paragraph charges assault.

It is conceded by appellant that the first and second specifications of error are not properly presented. It is correctly claimed, however, that the ruling of the court in refusing to require plaintiff to separate her causes of action is raised by the third specification, viz., the overruling of appellant's demurrer to the complaint. The improper joining of causes of action is cause for demurrer, and was one of the grounds given in the demurrer filed to each paragraph of the complaint. Judged by the general scope and the controlling averments of each paragraph of the complaint, each is in tort. *DeHart v. Haun*, 126 Ind. 378; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519. That the indecent liberties charged in the first and the assault in the second paragraph are a sufficient statement of facts to constitute a cause of action (another ground of the demurrer filed being a want of sufficient facts), there can be no question.

The complaint was originally in one paragraph. The court permitted appellee to file a substituted first paragraph. Subsequently appellee was permitted to file a second paragraph. In this there was no error. It does not appear that in these rulings the trial court abused its discretion.

In discussing the question arising upon the motion for a new trial complaint is made of the action of the court in requiring, over objection, upon cross-examination, appellant to detail the kind of medicine he administered to the patient, there being no charge in the complaint that he had administered medicines of any kind. There was

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no error in this ruling in view of the fact that appellant in chief testified to her condition, and that he administered to her proper remedies.

It is also alleged that plaintiff was granted too much latitude in embracing alleged facts in hypothetical questions propounded to Dr. Rose, an expert witness in behalf of appellee, that it embraced assumed facts that were without support in the evidence, and which, in their nature, were calculated to create prejudice in the minds of the jury. It is pointed out that the questions assume, without warrant, that the physician placed his arm about the plaintiff's waist, caressed, and kissed her, and solicited her to sexual intercourse with him. The plaintiff testified that appellant, while they were out riding in the doctor's cab, put his arm around her neck twice, tightly holding her, until she urged him to take it away; that he put his hand into the bosom of her dress, and, while he did not, in terms, solicit her to sexual intercourse, his talk and conduct were suggestive and offensive to a pure-minded young girl. All the facts embraced were not proved, but in an instruction the court informed the jury that the value of an opinion given by an expert upon a hypothetical question must depend upon the facts proved which are embraced in the question. The error, if any, was thus cured. It is due to appellant to say that he denied the alleged indecent conduct, and that certain facts and circumstances testified to corroborate him, but it was the province of the jury to pass upon this conflict.

Objections were made and exceptions taken to the giving to the jury of certain instructions; with others, the seventh. It is as follows: "If a person holds himself out to the public as a physician, he must be held to possess and exercise ordinary skill and knowledge and care in his profession in every case of which he assumes the charge, whether in the particular case he receives a fee or not. Where an injury results from the want of ordinary skill

or attention in the treatment of a case, the physician is responsible for such injury. A person who offers his services to the public in any profession or business impliedly contracts with those who employ him that he is a person of the skill and experience which is possessed ordinarily by those who practice or profess to understand the same art or business which is generally required by those most conversant with that profession or employment as necessary to qualify him to engage in such business or profession successfully."

A physician is bound to possess and exercise only the average degree of skill possessed and exercised by members of the medical profession practicing in similar localities. *Baker v. Hancock*, 29 Ind. App. 456; *Gramm v. Boener*, 56 Ind. 597; *Smith v. Stump*, 12 Ind. App. 359; *Whitesell v. Hill*, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830; *Becknell v. Hosier*, 10 Ind. App. 5; *Jones v. Angell*, 95 Ind. 376. Under the foregoing decision the instruction complained of can not be upheld. It fixes the standard of skill required too high.

We have examined the remaining instructions to which exceptions were taken, and find in them nothing warranting a reversal of the judgment.

There is nothing in the record to indicate upon which paragraph of the complaint the verdict was founded. There was serious conflict in the testimony based upon the assault charged and the medical treatment.

We are not warranted in saying from the record that the substantial rights of the appellant were not affected by said instruction seven, nor that it was harmless.

Judgment reversed, with instruction to sustain appellant's motion for a new trial.

SIMPSON v. SCHUETZ, ADMINISTRATOR.

[No. 4,808. Filed May 20, 1903.]

APPEAL.—Circumstantial and Opinion Evidence.—Weight.—On appeal the court will not weigh the evidence, although the verdict of the jury is based wholly on circumstantial and opinion evidence, and positive evidence to the contrary was discredited by the jury.

From Clay Circuit Court, *P. O. Colliver*, Judge.

Action by Benjamin Simpson against Edward Schuetz, administrator of the estate of William Baxter, deceased. From a judgment for defendant, plaintiff appeals. *Affirmed.*

G. A. Knight, for appellant.

A. W. Knight, for appellee.

ROBY, C. J.—This cause, on petition, was advanced.

Appellant filed his claim against the estate of William Baxter, deceased, upon two promissory notes—one dated May 18, 1901, for \$350, and one dated June 29, 1901, for \$2,100—both due six months from date, and both purporting to be signed by decedent. He produced upon trial a witness who testified that he was present when the notes were made; that he filled out the blank forms upon which they were written; saw them signed by decedent, and saw the money for which they were given paid over. He produced a second witness, a son of the first one, who testified in part to the same facts.

Appellee introduced evidence tending to show that decedent, in January, 1900, sued appellant on a \$1,000 note, which was subsequently paid; that in May, 1901, they quarreled over unpaid costs made in that action; that they were on bad terms, not speaking to each other. Two witnesses testified to statements by appellant to the effect that he had not spoken to Baxter after the affair of the note.

Decedent left an estate of \$21,000, including notes for \$900 and \$2,000 in cash. He was in the habit of loaning money, and was not known to have been a borrower. It does not appear from what source appellant procured the money claimed to have been loaned, or what use was made of it by decedent. Fourteen non-expert witnesses testified that the notes were not signed by decedent. The points of dissimilarity stated by them between the alleged and the genuine signature were striking, and no evidence was introduced to disprove such dissimilarity. This evidence was, of course, opinion evidence, but it seems to have been given with positiveness, while no witnesses testified to the authenticity of the signatures except as above stated, which, in view of the large number of times decedent seems to have made his genuine signature, is remarkable, if any similarity existed. There are numerous other facts and inferences deducible from the evidence, but it is not necessary to enumerate them.

The sole error assigned is the overruling of appellant's motion for a new trial. The argument is based upon the proposition that the evidence is not sufficient to sustain the verdict. The exact proposition relied upon is that, inasmuch as the positive evidence shows decedent to have received the money, opinion evidence as to the genuineness of the signatures is insufficient to meet it. There were facts proved from which the inference might reasonably be drawn that no money was loaned to decedent. The jury have drawn that inference. The trial judge has approved the verdict. It was the province of the jury to weigh the positive as well as the circumstantial evidence. The witnesses introduced by appellant were evidently not credited. We can not say that they were entitled to credit. Positive evidence which is not believed does not constitute proof.

Judgment affirmed.

**WORK, ADMINISTRATOR, v. AMERICAN MUTUAL
LIFE INSURANCE COMPANY ET AL.**

[No. 4,294. Filed May 20, 1903.]

INSURANCE.—Void Policy.—Recovery of Premiums.—Insurable Interest.—

One who took out policies of insurance on the lives of persons in whom he had no insurable interest, without their knowledge or consent, and in violation of §4905 Burns 1901, can not recover from the company the premiums paid by him thereon, although the company knew all of the facts.

From St. Joseph Circuit Court; *W. A. Funk*, Judge.

Action by Aaron Work, administrator of the estate of Elias E. Thornton, deceased, against the American Mutual Life Insurance Company and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

J. D. Osborne, R. M. Johnson and Robert Lowry, for appellant.

J. M. Van Fleet and V. W. Van Fleet, for appellees.

HENLEY, J.—Appellant prosecutes this action to recover back the premiums and assessments paid by his decedent on four policies of insurance issued by the appellee on the lives of four certain persons, named in the policies, in each of which policies one Cyrus Ferris was designated as beneficiary. Ferris assigned the policies to appellant's decedent.

It is alleged in the first paragraph of the complaint that the policies were all void, for the reason that they were issued without the knowledge of the assured; that neither Ferris nor Elias E. Thornton, the decedent, had an insurable interest in the lives of the insured, nor had either of them the written consent of the assured, authorizing them, or either of them, to pay the premium assessments on the policies. It is further averred that Thornton was a farmer, unused to business, illiterate, unable to read and write

the English language, confiding, and easily influenced by others; that appellees, knowing all these facts regarding him, conspired together to defraud him by procuring him to pay for illegal policies of insurance issued by the appellee company; that it was arranged to have one of appellees—the said Ferris—take out policies of insurance on his relatives, in whom he had no insurable interest, and to do so without their consent, and to procure the said Thornton to pay the fees and assessments on said policies by assigning them to him, the said Ferris representing to Thornton that such arrangement would be legal and valid, and would be a good investment; that said plan was carried out, and Thornton, relying upon the false statements, received and paid for the illegal policies the various amounts set out in the itemized bill filed with the complaint, which amounts he now seeks to recover. The second paragraph of complaint averred that the appellees, except the said Ferris, were indebted to appellant in the sum of \$2,000, for money had and received; setting out an itemized statement of the amounts, and dates when paid, and demanding judgment accordingly. Appellees answered the complaint in five paragraphs, each of which was held sufficient by the trial court. The cause was put at issue by reply. There was a trial, and a special finding of facts, conclusions of law stated, and judgment against appellant for costs.

The facts found by the court were substantially as follows: The American Mutual Life Insurance Company is a corporation organized under the laws of the State of Indiana and is engaged in the business of life insurance on what is known as the assessment plan. Its principal office is at Elkhart. On the 30th day of October, 1886, said company issued to one Cyrus Ferris a certificate of life insurance upon the life of one Jacob Gaylor, and said Ferris on the 16th day of April, 1887, assigned said certificate of insurance to appellant's decedent, Elias E. Thorn-

ton. On the 22d day of May, 1887, said company issued to said Ferris a certificate of life insurance upon the life of one Pamilia Moore, and on the 23d day of May, 1887, said Ferris assigned said certificate to appellant's decedent. On the 25th day of June, 1887, said company issued to said Ferris a second certificate of life insurance upon the life of said Pamilia Moore, and on the same day said Ferris executed to said decedent a power of attorney authorizing him to pay the assessments and to collect any moneys that might be payable to the beneficiary upon the death of the assured. On the 17th day of September, 1887, said company issued to said Ferris a certificate of life insurance upon the life of one Jacob Gaylor, and on the same day said Ferris executed to said decedent a power of attorney in like manner and form as the one executed in regard to the policy issued on the life of Pamilia Moore. At the time said certificates of insurance were issued to said Ferris he did not have an insurable interest in the life of Jacob Gaylor or the life of Pamilia Moore, and he did not have the written consent of either of the insured authorizing him to pay the assessments made upon the certificates of insurance. Neither Gaylor nor Moore was indebted to Ferris, nor was he in any way dependent upon either of them for support, and neither of them was a member of the Ferris family. Appellant's decedent, Elias E. Thornton, did not have an insurable interest in the lives of either of the assured heretofore named, but, under the arrangement entered into by him, he paid, during his lifetime, to said insurance company the various assessments made on said certificates, to the amount of \$994.60. Before commencing this action, said Thornton demanded of said insurance company the return of the money so paid, and the company refused to return it, or any part of it. During the pendency of the action in the trial court Thornton died, and his administrator was substituted as plaintiff.

The sixteenth finding of the court, which we think disposes of this appeal adversely to appellant, was as follows: "That said policies were taken out in the name of said Cyrus Ferris at the request and upon the solicitation and advice of Elias Thornton, and were assigned by said Ferris to said Thornton; that prior to and at the time of said transaction said Thornton knew that it was necessary to the validity of the policies, so taken and assigned, that there should be a written consent to pay the assessments thereon given by the person insured, or that the person holding the policy must have an insurable interest, and that it was necessary to have the consent of the person insured to take out such a policy; that at the time said Thornton procured said policies to be issued and assigned as aforesaid, he well knew all the facts in relation to whether the insured parties had given consent as aforesaid, or whether he had a pecuniary or insurable interest in the lives of the persons so insured; that all assessments on said policies were paid by said Thornton; that said Thornton informed said Ferris that no written consent was necessary." Upon these facts the court concluded that the appellant had no cause of action.

The facts found completely refute the averments of the complaint that Thornton was induced by conspiracy, fraud, and misrepresentation to enter into the arrangement concerning the policies of insurance. On the other hand it is shown that Thornton induced Ferris, who was neither an officer nor agent of the insurance company, to take out the policies, and assign them to him. Thornton arranged, carried out, and expended his money upon an unlawful scheme with which he was thoroughly acquainted. He knew that the policies were void *ab initio*, and knew the facts which caused them to be void. He knowingly secured the policies upon the lives of persons without their knowledge or consent. This, under our statute, is a felony. §4905 Burns 1901.

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Conceding that the insurance company knew of all the facts leading up to the issuing of the policies does not help appellant's position. It only shows that he was *in pari delicto* with the company. He paid his money out upon contracts obtained by him, which contracts were contrary to public policy, and expressly prohibited by statute. The same doctrine is upheld in the case of *Winchester Electric Light Co. v. Veal*, 145 Ind. 506. In that case a county treasurer violated an express statute by loaning the money held by him as county treasurer, and it was there held that the treasurer could not maintain an action to recover the money, because such an action would be based upon his own illegal act. The same doctrine is recognized in *Metropolitan Life Ins. Co. v. Bowser*, 20 Ind. App. 557; 2 Greenleaf, Evidence, §111; 4 Wait, Actions and Defenses, 460; *Chalfant v. Peyton*, 91 Ind. 202, 46 Am. Rep. 586; *Blattenberger v. Holman*, 103 Pa. St. 555; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728, 11 Am. St. 667.

There should be, and there is, a plain distinction between the cases wherein the policy is void *ab initio* by reason of some defect in the contract, and cases of the character of the one at bar, wherein both public policy and the criminal law of the State were violated by the complaining party at the very outset.

Under the facts found, we think the trial court rightly concluded that appellant had not established the material averments of his complaint. The action having been defeated wholly by facts proved under the issue made by the complaint and general denial, the other errors complained of are harmless.

Judgment affirmed.

SHROYER v. PITTENGER ET AL.

[No. 4,397. Filed May 20, 1903.]

INFANTS.—Deeds.—Disaffirmance.—Restoring Consideration.—In a complaint to set aside a deed made by plaintiff while she was an infant it is not necessary to allege that the consideration was restored before disaffirming the sale, where it is alleged that plaintiff received no consideration for the sale. *p. 160.*

SAME.—Contracts Voidable.—Contracts of infants are not void because of nonage, but voidable only. *pp. 160-162.*

SAME.—Disaffirmance of Contracts.—The contract of an infant can not be avoided or disaffirmed because of nonage merely until the infant reaches majority. *p. 161.*

SAME.—Deeds.—Disaffirmance.—The act of disaffirming a deed made by an infant need not be by instrument of equal solemnity, nor in writing served upon the grantee, but may be accomplished by the infant, upon arriving at full age, by some act of positive and distinct dissent inconsistent with the continued validity of the deed. *p. 161.*

SAME.—Deeds.—Disaffirmance.—Where a married woman twenty years of age residing in Dakota, in January, 1884, executed a deed to real estate in Indiana, the disaffirmance thereof by her after her return to Indiana in November, 1885, was within a reasonable time after arriving at full age. *pp. 162, 163.*

LIMITATION OF ACTIONS.—Pleading.—Amendment.—Where the amended pleading states a different cause of action from that stated in the original complaint it can not be made to relate back to the time of filing the original so as to defeat the operation of the statute of limitations; but an amendment which amounts to a restatement of the original cause of action does relate back to the filing of the original. *p. 163.*

SAME.—Pleading.—Amendment.—Presumption.—Where the record shows that the pleading filed was "an amended complaint," it will be presumed, in the absence of some showing to the contrary, that it was a restatement of the original cause of action. *p. 163.*

PLEADING.—Misjoinder of Causes of Action.—Demurrer.—A misjoinder of causes of action is not reached by demurrer for want of sufficient facts. *p. 163.*

From Delaware Circuit Court; *J. G. Leffler*, Judge.

Suit by Flora M. Shroyer against John A. Pittenger and others. From a judgment for defendants, plaintiff appeals. *Reversed.*

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W. W. Orr, F. W. Stradling, Rollin Warner and A. W. Brady, for appellant.

J. N. Templer, C. C. Ball and E. R. Templer, for appellees.

ROBINSON, J.—Appellant's complaint avers that in 1884 Hannah Cline owned a life estate in certain described lands, with remainder in fee in appellant and two others. Hannah Cline died in 1892. In 1894 and 1895 appellant, by purchase, became the owner of the whole. In 1884 appellant was a minor twenty years of age, a married woman, residing with her husband in the territory of Dakota, and in January of that year she and her husband executed a deed to appellee, conveying to him the undivided one-third in fee of the land, which deed was duly recorded. The deed recites a consideration of \$400, but it is averred she received no consideration whatever, that appellee knew of her minority, and that she received no consideration for the conveyance. In 1885 appellant and her children were abandoned by the husband, and she returned to her mother's, Hannah Cline, then residing on the land, and immediately notified appellee that she was a minor when she executed the deed, and that she received no consideration therefor, and that she would not be bound by the same, but repudiated and disaffirmed the deed, and repeatedly thereafter so stated and asserted to him; that thereupon appellee acknowledged that he knew she was a minor when she made the deed, and that she was not bound thereby, and that she had the right to avoid the deed, but that appellee had paid the husband \$400 therefor, and that he should be repaid that sum; that appellee, at the time, owned land adjoining, upon which he operated a stone quarry near the dividing line, the strata of stone extending continuously from one tract to the other, and which was of great value for quarrying for market; that thereupon appellant agreed that appellee might operate the quarry on the lands in question until he had been repaid the \$400,

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and that he would not have the deed recorded, but that the same should be canceled and destroyed; that, pursuant to this agreement, appellee extended the quarry onto not exceeding one-half acre of the lands in question, and removed stone therefrom of the value of \$3,000; that appellee has never had possession of the rest of the land, but the same was in the possession of Hannah Cline until her death, and since in the possession of appellant; that appellee has wrongfully placed the deed on record, and claims an interest in the land, which is without right, and is a cloud upon appellant's title; that appellee continues, without right, to quarry stone from the land, and refuses to account to appellant for the value thereof; that on an accounting there is due appellant \$2,000; that appellant offers to abide by any order the court may make in the premises. Prayer for an accounting, an injunction to enjoin the further operation of the quarry, judgment for damages, that the deed be declared void, and appellant's title quieted. A demurrer to the complaint was sustained, and on that ruling rests the assignment of error.

The husband did join in the conveyance, but it does not appear that he was of full age. Moreover it is averred that appellant received no consideration for the sale, so that it was not necessary to restore the consideration before disaffirming the sale, as provided in §3364 Burns 1901. See *Miles v. Lingerian*, 24 Ind. 385.

The courts of this State, and very generally, construe infants' contracts voidable and not void, for the reason that it is for the sole advantage of the infant that the privilege of avoiding a contract is conferred, and such a construction more often promotes public justice, and operates more advantageously to the infant himself. What confusion exists on the subject has arisen from a careless use of the words "void" and "voidable." An infant's contract might be void for reasons that would render a contract of an adult void. But the better reasoning supports the rule

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that no contract of an infant is void because of his nonage, but all such contracts are voidable only, except contracts for necessities, and such contracts as he may make by statutory authority, which are binding. See *Fetrow v. Wiseman*, 40 Ind. 148; *Law v. Long*, 41 Ind. 586; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Buchanan v. Hubbard*, 119 Ind. 187; *Losey v. Bond*, 94 Ind. 67; *Welch v. Bunce*, 83 Ind. 382.

An infant's conveyance of lands, being not void, but voidable, can not be avoided or disaffirmed because of nonage, merely, until the infant reaches majority; and no right of action because of infancy at the time of the conveyance, as to lands conveyed, exists until the conveyance has been avoided or disaffirmed. While a conveyance of the same land to some one else after majority, and in disregard of the former deed, is a disaffirmance of the deed made during infancy, yet the doctrine that the act of disaffirmance must be by instrument of equal solemnity with the instrument sought to be avoided no longer obtains. Nor do we understand it to be the rule in this State, as claimed by counsel, that the act of disaffirmance must necessarily be in writing, and served upon the grantee. Such an act would be a disaffirmance, but not exclusively so. Disaffirmance does not consist wholly of some act done, but is a matter both of act and intention, and is accomplished where the party, after full age, and intending to disaffirm, does some act of positive and distinct dissent, inconsistent with the continued validity of the contract made during infancy. The rule is thus stated in *Long v. Williams*, 74 Ind. 115: "There are in this State several well recognized modes of disaffirming a voidable deed. The disaffirmance may be by entry upon the land, by a written notice of disaffirmance, by a subsequent conveyance, or by any other equally emphatic act, declaratory of an intention to disaffirm." See *McCarty v. Woodstock Iron Co.*, 92 Ala.

463, 8 South. 417, 12 L. R. A. 136; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Illinois Land, etc., Co. v. Beem*, 2 Ill. App. 390; *Allen v. Poole*, 54 Miss. 323; *Dixon v. Merritt*, 21 Minn. 196; *Cogley v. Cushman*, 16 Minn. 397; *State v. Plaisted*, 43 N. H. 413; *Bagley v. Fletcher*, 44 Ark. 153; *Drake v. Ramsay*, 5 Ohio 251; *Moore v. Abernathy*, 7 Blackf. 442; *Buchanan v. Hubbard*, 119 Ind. 193; *Craig v. Van Bebbler*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. 569 and note.

The time within which the deed must be disaffirmed after the infant becomes of full age depends upon the particular circumstances of each case. The object sought to be accomplished in requiring a disaffirmance is to avoid litigation, and to enable the parties to correct the evils without suit and costs. *McClanahan v. Williams*, 136 Ind. 30; *Lange v. Dammier*, 119 Ind. 567. All the authorities seem to agree that the contract must be disaffirmed within a reasonable time. "What constitutes the reasonable time," said the court in *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263, "within which a person who has executed a deed during infancy shall disaffirm it, depends upon the particular circumstances of each case. The right must be exercised before the statute of limitations has become a bar to an action to recover the land conveyed, and it may be, under the circumstances of the particular case, that it should be exercised within a shorter period. It is the disaffirmance which avoids the deed of the infant, and not the bringing of the action to recover the land conveyed." In the case at bar the deed was executed in January, 1884, while appellant was living in the territory of Dakota, and upon her return in 1885, and frequently thereafter, she repudiated the deed. She lived with her mother upon the land until the mother's death, and since then she has had possession of the land in question, except about one-half acre. The complaint does not plead any acts or conduct on the part of appellant after the disaffirmance which show

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an affirmance of the deed. If there was anything said or done by appellant after the alleged disaffirmance that would show she afterwards confirmed the deed, it would properly be brought forward by answer. The facts pleaded show that the disaffirmance was within a reasonable time after arriving at full age. See *Scranton v. Stewart*, 52 Ind. 68; *Sims v. Bardoner*, *supra*, and cases cited.

It is further argued that from the facts pleaded it appears that when the amended complaint was filed the action was barred by the statute of limitations. It is the rule that where the amended pleading states a different cause of action from that stated in the original complaint, it can not be made to relate back to the time of filing the original, so as to defeat the operation of the statute of limitations. *Blake v. Minkner*, 136 Ind. 418. But an amendment which amounts to a restatement of the original cause of action does relate back to the filing of the original. As the record shows that the pleading filed was an "amended complaint," it will be presumed, in the absence of some showing to the contrary, that it was a restatement of the original cause of action. It does not appear from the record that a new action was commenced with the filing of the amended pleading. The generally accepted meaning of the term "amended pleading" is the correction of an error committed in the pleading. *Anderson's Law Dict.*; *Black's Law Dict.*; *Burrill's Law Dict.* See *Lagow v. Neilson*, 10 Ind. 183; *Fleenor v. Taggart*, 116 Ind. 189; *School Town of Monticello v. Grant*, 104 Ind. 168.

If, as argued, the complaint has improperly united several causes of action, such defect is not reached by a demurrer for want of sufficient facts. *Baddeley v. Patterson*, 78 Ind. 157; *Bayless v. Glenn*, 72 Ind. 5; *Lane v. State, ex rel.*, 27 Ind. 108; *Cargar v. Fee*, 140 Ind. 572. While the complaint contains some matters improperly pleaded, yet there are enough facts well pleaded to withstand a demurrer. The deed was executed by appellant

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while under age, and was repudiated and disaffirmed by her within a reasonable time after she became of age. Under the facts averred, she was not required to restore the consideration paid by appellant. She was under age, and received no consideration for the deed, both of which facts appellant knew. Since the death of the life tenant she has resided upon the land, and has had exclusive possession of all the land except about one-half acre.

The demurrer to the complaint should have been overruled. Judgment reversed.

SCHLICHTER v. TAYLOR ET AL.

[No. 4,451. Filed May 21, 1903.]

APPEAL.—*Transcript.*—*Original Bill of Exceptions.*—*Evidence.*—Where appellant filed a written precept with the clerk directing the making up of the transcript, and the transcript prepared contains the original bill of exceptions containing the evidence, and an entry to the effect that the clerk attached such original bill at the "request of appellant," the evidence is in the record. pp. 166, 167.

SAME.—*Briefs.*—*Failure to Comply with Court Rules.*—Questions as to the admissibility of evidence and of permitting an alleged incompetent witness to testify, will not be considered on appeal, where appellant's brief does not contain "an abstract of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript" as required by rule twenty-two of the Appellate Court. p. 168.

NEW TRIAL AS OF RIGHT.—*When Properly Denied.*—If two or more substantive causes of action proceed to judgment in the same case, whether properly or improperly joined, one being of the class in which a new trial as of right may be granted, and the other not, the latter will control the procedure, and a new trial as of right will be denied. pp. 168, 169.

SAME.—*Partition.*—*Oral Contract to Convey Real Estate.*—A new trial as of right will not be granted in a suit for partition, where defendant claims title to and possession of the real estate under an oral contract. pp. 168, 169.

From Clark Circuit Court; J. K. Marsh, Judge.

Schlichter v. Taylor.

Suit for partition by Frank Taylor and others against Jessie E. Schlichter and others. From a judgment for plaintiffs, defendant Schlichter appeals. *Affirmed.*

L. A. Douglass, for appellant.

G. H. D. Gibson, for appellees.

WILEY, J.—This was an action for partition of real estate. Appellant was one of the defendants below. The complaint alleged that appellees and appellant were owners as tenants in common of certain real estate; that such real estate was not susceptible of partition in kind; and asked that it might be sold and the proceeds divided according to the interests of the parties. The petitioners based their right for partition upon the fact that they and the defendants below were the heirs of one Rachael Cochran, deceased, who died seized the owner of the real estate in controversy. In her answer appellant admitted the heirship as charged, but denied that Rachael Cochran died the owner of the real estate. The answer further alleges a verbal contract between the said decedent and appellant, by the terms of which it was agreed between them that if she and her husband would go to her home and take charge of the same, and be a companion to her and take care of her during her natural lifetime, and take charge of and cultivate said real estate for said Rachael during her lifetime, she, said Rachael, would give and convey said real estate to her; that she in all things performed the conditions of said agreement on her part; and that she thereby became the owner thereof. It is further alleged that appellant was put in actual possession of the real estate. The cross-complaint avers the same facts, and in addition, that the said Rachael died intestate, and did not comply with her said contract, in that she did not convey said real estate to appellant, and that said contract remains unperformed. In the cross-complaint it is also averred that before the commencement of this action appellant served written notice upon

the heirs of said Rachael that they make a deed to her of said real estate in compliance with said contract, and that they failed to do so; that by reason of the facts charged appellant is entitled to have said contract specifically performed and have her title quieted. Issues were joined, trial by the court, and a general finding for the petitioners to the effect that they and the defendants below were the owners as tenants in common of the real estate in controversy; that said real estate was not susceptible of division in kind; and that the same should be sold and the proceeds be distributed according to the interests of the several parties, etc.

Appellant's motion for a new trial for cause, and her motion for a new trial as of right, were each overruled, and the rulings on these motions are assigned as errors.

Appellant was given a fixed time in which to file a general bill of exceptions embodying the evidence, and such bill was timely filed. The record or transcript on appeal was made under the written direction of the appellant's counsel, and the precipe is attached, as required by statute. §661 Burns 1901. By that precipe the clerk was requested to make out a duly certified transcript of certain records and papers, and included in the list was: "(9) Bill of exceptions of the evidence." The clerk did not make a transcript of the evidence, but embodied the original bill of exceptions embracing the evidence.

Counsel for appellees urge that the evidence is not properly in the record, and hence the motions for a new trial can not be considered. In support of their position we are cited to *Chestnut v. Southern Ind. R. Co.*, 157 Ind. 509, and *Johnson v. Johnson*, 156 Ind. 592. These cases seem to support this contention, but we find in the record an entry to the effect that the clerk attached to the transcript the original bill of exceptions containing the evidence, at the request of appellant. In *Tombaugh v. Grogg*, 156 Ind. 355, it is held that although appellant filed a

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written precept directing the making up of the transcript, which amounted to a request for a copy of the bill of exceptions, it does not follow that an oral request was not subsequently made to insert the original, and where the original bill is in the transcript it will be presumed, in the absence of anything to the contrary, that the clerk incorporated the same at the subsequent request of the appellant. In that case the record did not show affirmatively any subsequent request, and yet it was held that the bill was properly a part of the record. Here the record does show a subsequent request, and we must presume that it was oral, nothing to the contrary appearing. Under the authority last cited we must hold that the evidence is in the record.

In her motion for a new trial appellant challenges the sufficiency of the evidence to sustain the finding, and the action of the court in admitting certain evidence. We can not disturb the judgment upon the evidence, for it is conflicting, and there is ample evidence in support of the finding of the trial court.

The questions of the admissibility of incompetent evidence and of permitting a witness to testify who was not competent, will not be considered for the following reasons: (1) Counsel has waived the right to have some of them determined by failing to discuss them; (2) failure of counsel to comply with rule twenty-two of this court.

The tenth and eleventh points appellant relies upon for a reversal are as follows: "(10) The objection of appellant to testimony of witnesses should have been passed on by the court before it rendered its decision. (11) William D. Taylor, party plaintiff, was not a competent witness as to matters occurring prior to the death of Mrs. Cochran." In attempting to discuss these points counsel says:

"Tenth proposition: The motion for a new trial for cause recites the action of the court in permitting certain incompetent evidence to be given in evidence, and it is a fact that no ruling was made upon objection of appellant until

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the time of rendering the decision. By such action she was placed at a disadvantage, as it is never presumed that a litigant can anticipate that incompetent evidence will be admitted against her. Evidence of declarations of appellant's husband made in her absence can not bind her. * * * And the evidence of William D. Taylor, appellee, was not competent as to matters occurring prior to the death of Mrs. Cochran.

"Eleventh proposition: The cases cited under that head are sufficient to show that he was not a competent witness; yet, notwithstanding the fact, he was permitted to testify at length upon the subject."

This is the sum and substance of what counsel has said under these propositions. Nowhere in the brief is an abstract of the alleged incompetent evidence set out, nor a reference made to the line and page of the transcript where it may be found. We are not advised of the character of the evidence, nor is there even a suggestion in the brief why Taylor was not a competent witness. Where a party fails to call the court's attention to the particular part of the record where the questions asked to be decided may be found, he waives his right to have them decided. Rule 22, *supra*; *Home Ins. Co. v. Sylvester*, 25 Ind. App. 207; *Wines v. State Bank*, 22 Ind. App. 114; *Smiser v. State, ex rel.*, 17 Ind. App. 519; *Harness v. State, ex rel.*, 143 Ind. 420. See Remy's Digest, p. 55, §490.

Appellant's motion for a new trial as of right rests upon the proposition that the title to the real estate was involved. In an action for partition of real estate the question of title is not necessarily involved. In her answer to the complaint appellant avers a contract between a Mrs. Cochran (her mother) and herself, whereby her mother agreed, under certain conditions, to give to her the real estate in controversy; that she performed all the conditions of said contract on her part, but that her mother died without conveying the land to her. In her cross-complaint she avers

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the same contract; the failure on the part of her mother to perform it; a demand on the appellees, as heirs of the decedent, to convey to her; and asks for specific performance. True, in her cross-complaint, she asks also that her title be quieted. She thus tenders a double issue, and we do not pass upon the sufficiency of the cross-complaint for the reason that it is not presented by the record.

In an action for specific performance a new trial is not demandable as of right. It has been held that, in an action to declare a deed a mortgage and to quiet title, a new trial as of right will not be granted. *Jones v. Peters*, 28 Ind. App. 383. In *Bennett v. Closson*, 138 Ind. 542, it was held that it is only in actions for the recovery of real estate and to quiet title to real estate that the losing party may have a new trial as of right, under §1076 Burns 1901, §1064 R. S. 1881 and Horner 1901; and if two or more substantive causes of action proceed to judgment in the same case, whether properly or improperly joined, one being of the class in which a new trial as of right may be granted, and the other not, the latter will control the procedure, and a new trial as of right will be denied. See, also, *Wilson v. Brookshire*, 126 Ind. 497, 9 L. R. A. 792; *Richwine v. Presbyterian Church*, 135 Ind. 80; *Nutter v. Hendricks*, 150 Ind. 605; *Butler University v. Conard*, 94 Ind. 353. In *Voss v. Eller*, 109 Ind. 260, it was sought to declare a deed a mortgage, and to cancel the same because of payment and to quiet title, and the court held that the action did not involve the title to the land to any greater extent than title is involved in any other suit to decree a mortgage satisfied and to procure its cancelation, and hence the losing party was not entitled to a new trial as of right. In *Nutter v. Hendricks*, *supra*, it was said that, where a paragraph of complaint for the possession of real estate or to quiet title thereto is joined in the same complaint for any other cause of action, a new trial as of right, under §1076 Burns 1901, is not permitted. These

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authorities settle the question against the contention of appellant.

From the whole record we are led to the conclusion that the trial court reached the only result warranted by the evidence, and that the judgment pronounced equitably and correctly adjusted the rights of the respective parties.

Judgment affirmed.

CHAPPELL ET AL. v. JASPER COUNTY OIL & GAS
COMPANY.

[No. 4,603. Filed February 24, 1903. Petition to retax costs granted May 21, 1903.]

APPEAL.—*Filing Amended Complaint Without Leave.—No Exception.—*

Where no objection was made to the filing of an amended complaint, no error can be predicated upon the court's action in permitting it to be done. *p. 171.*

SAME.—*Record.—Pleading Withdrawn.—*When a pleading is withdrawn, all rulings thereon pass out of the record with it. *p. 171.*

SAME.—*Joint Exception.—Separate Assignment of Error.—*A separate assignment of error by one defendant, on a ruling to which appellant with his codefendants excepted jointly, presents no question for review. *p. 172.*

INJUNCTION.—*Complaint.—Irreparable Injury.—*In an application for an injunction, it is not necessary to aver that the plaintiff will suffer irreparable injury if the relief asked is not granted; an averment that applicant will suffer great injury is sufficient. *p. 172.*

SAME.—*More Efficient Remedy.—*A remedy at law will not bar injunction, where the remedy by injunction is more practical and efficient. *p. 172.*

APPEAL.—*Precipe.—Transcript.—Bill of Exceptions.—Evidence.—*Where the precipe filed by the appellant directed the clerk to prepare and certify a "full, true, and complete transcript of the proceedings, papers on file, and judgment" in the cause, the action of the clerk in certifying the original bill of exceptions was unauthorized, and the same is no part of the record. *p. 173.*

TRIAL.—*Special Finding.—Motion to Modify.—*A motion to modify or strike out a special finding is not recognized by the code of procedure in this State, and such motion may be overruled or stricken out by the court. If the facts are found contrary to the evidence the remedy is by motion for a new trial. *p. 176.*

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TRIAL.—*Special Finding.*—*Conclusions of Law Without the Issues.*—The assignee of an oil lease brought suit to enjoin another, who claimed a lease of the same premises, from drilling for oil thereon. The original lessor was not made a party to the suit. *Held*, that conclusions of law as to the rights between the lessor and the assignee under the lease were without the issues, and erroneous. *p. 177.*

SAME.—*Conclusions of Law.*—*Surplusage.*—Where the judgment follows the conclusions of law as a whole, and the evidence is not in the record, no part of the conclusions can be considered as surplusage. *p. 178.*

From Jasper Circuit Court; *S. P. Thompson*, Judge.

Suit for injunction by Jasper County Oil & Gas Company against Howard F. Chappell and others. From a judgment for plaintiff, defendant Chappell appeals. *Reversed.*

B. F. Ferguson, J. E. Wilson and Marston & Tuttle, for appellant.

D. M. Shively, Frank Foltz, C. G. Spitler, H. R. Kurrie, J. S. Dailey, Abram Simmons and F. C. Dailey, for appellee.

ROBINSON, J.—This case was transferred from the Supreme Court under the act of March 12, 1901.

The amended paragraph of complaint upon which the case was tried sought to enjoin appellant from boring and operating gas and oil wells on certain lands controlled by appellee. A trial by the court resulted in a decree granting a perpetual injunction against appellants upon the compliance by appellee with certain stipulated conditions.

A demurrer to the original complaint in one paragraph was sustained, and leave given to file an amended complaint. As no objection was made to the filing of the amended complaint, no error can be predicated upon the court's action in permitting it to be done.

As the second and third paragraphs of amended complaint were withdrawn before the trial, no harmful error was committed by the court in permitting them to be filed, or in refusing to strike them out on motion, or in overrul-

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ing demurrers thereto. When a pleading is withdrawn, all rulings thereon pass out of the record with it.

There were four defendants in the court below, against all of whom the judgment and decree were rendered. Appellant Chappell alone has assigned error. Many of the exceptions to the court's rulings on the pleadings were taken by the "defendants." A separate assignment of error by one of several parties who were defendants below does not present any question upon a ruling to which all the defendants excepted jointly. Appellant Chappell separately demurred to each paragraph of the complaint, and all the defendants also demurred to the complaint, and the "defendants" reserved an exception to the ruling on the demurrers. The record does not show that appellant reserved any exception to the ruling on his separate demurrer. The sufficiency of the complaint is also questioned by an assignment of error.

In an application for an injunction, it is not necessary to aver that the plaintiff will suffer irreparable injury if the relief asked is not granted, but it is sufficient to aver that he will suffer great injury. It may be true in the case at bar that appellee had a remedy at law, but it was not "as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity." *Watson v. Sutherland*, 5 Wall. 74, 18 L. Ed. 580. In *Pomeroy*, Eq. Jurisp. (2d ed.), §1357, it is said "that a remedy which prevents a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess." See *Champ v. Kendrick*, 130 Ind. 549; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; *Erwin v. Fulk*, 94 Ind. 235; *Allen v. Winstandly*, 135 Ind. 105; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568; *Hart v. Hildebrandt*, 30 Ind. App. 415. The complaint, tested for the first time by an assignment of error, contains sufficient facts to bar another action.

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Xenia Real Estate Co. v. Macy, supra; Loeb v. Tinkler, 124 Ind. 331; *Citizens St. R. Co. v. Willooby*, 134 Ind. 563.

Many of the questions discussed by appellant's counsel are not presented, if, as insisted by appellee, the evidence is not in the record. The transcript discloses that appellant, by his counsel, filed with the clerk of the trial court a precipe as follows: "The Jasper County Oil & Gas Company v. Howard F. Chappell et al. The clerk of the Jasper Circuit Court will prepare and certify a full, true, and complete transcript of the proceedings, papers on file, and judgment in the above entitled cause, to be used on appeal to the Supreme Court of the State of Indiana." The transcript contains the original bill of exceptions, embracing the evidence given upon the trial. The precipe in the case at bar does not differ in any material respect from that in *Chestnut v. Southern Ind. R. Co.*, 157 Ind. 509, where it is held that under such a precipe the original bill of exceptions, containing the evidence, and authenticated by the clerk, though embodied in the transcript, is not a part of the record, and can not be considered; the court saying: "Under the directions given to the clerk in the precipe in question it became his duty to certify to this court a transcript or copy of the original bill of exceptions containing the evidence and the rulings of the court in the admission or exclusion of testimony, and his act in certifying the original bill was, under the statute, unauthorized." In *Johnson v. Johnson*, 156 Ind. 592, the court said: "Only such papers and entries as are designated in said precipe are properly a part of the record on appeal. Said precipe did not direct or request the clerk to certify to this court said original bill of exceptions containing the evidence, in any manner. Under such conditions if said original bill of exceptions containing the evidence was embodied in the transcript, and properly authenticated, the same would not be a part of the record and could not be

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considered." See, also, *Brown v. Armfield*, 155 Ind. 150; *McCaslin v. Advance Mfg. Co.*, 155 Ind. 298. Under these authorities, we must hold that the evidence is not before us.

The facts found by the court are that on August 1, 1899, Anna C. Hershman leased to the Tri-State Oil Company certain lands, which company, on July 18, 1900, assigned the lease to one McDonald, who assigned the same July 28, 1900, to appellee. The lease and assignments were duly recorded. By this lease the lessor granted to the lessee all the oil and gas in and under the land described, and the right to enter upon the premises to drill for oil and gas, and erect and maintain necessary buildings, and lay necessary pipes for the transportation of gas and oil, reserving to the lessor the one-eighth of all oil produced and saved, to be delivered in the pipe-line with which the lessee might connect its wells. If gas only was found in sufficient quantities to transport, the lessee agreed to pay the lessor \$100 annually for the product of each well so transported; lessor to have free gas for dwelling-house. In case no well was completed within ninety days from date of lease, "then this grant shall become null and void unless second parties shall pay to the first party twenty-five cents per acre annual rental payable monthly for each month thereafter such completion is delayed;" the lessee to have the right to use sufficient gas or oil to run all machinery for drilling and operating wells, and "the right to remove all property at any time." In case the first well was a water well, the lessee was to leave the casing therein, free of cost to the lessor; it was further agreed that the lessee or assigns might, "at any time, by paying to said first party, his heirs and assigns, the sum of \$1, and the said first party hereby agrees, for himself, his heirs or assigns, to accept said sum of \$1 in full for all claims of every kind and nature that could hereafter accrue on this lease; and the said second party, his heirs or assigns, shall release said first

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party, his heirs or assigns, from all claims by reason of having made this lease." It is further found that on October 13, 1899, the original lessee commenced drilling an oil-well, and at a depth of 112 feet struck oil, and prior to October 30, 1899, drilled the same to a depth of 120 feet, and on the next day drilled some feet further in the oil-bearing rock, and on November 7, 1899, removed the machinery, and placed a wooden plug in the top of the well; that oil was found in paying quantities, but the well was not "shot, pumped, or tested as to its capacity at any time;" that no oil was ever produced or marketed from the well, and the lessor was never paid in money, oil, or gas any sum for the purpose of prolonging the time of the lease; that no pipe-line has ever been constructed in the Jasper county oil fields, with which the well could be connected if it were in fact operated, and at the time of the completion of the well this field had not been developed, and there was then no facilities for saving and marketing oil; that neither the appellee nor any of the assignors of the lease notified the original lessor prior to August 22, 1901, that the well contained oil in paying quantities; that the original lessor at no time prior to the bringing of this action ever notified the original lessee or its lessee or appellee that she desired to have the lease forfeited; that on August 3, 1900, the original lessor gave to appellants permission, without the consent of the owner of the original lease, to go upon the land and drill for oil; that they entered upon the land and commenced drilling an oil-well, and had, when this suit was brought, August 25, 1900, drilled the same to a depth of ninety-six feet, and were intending to complete the same and take oil therefrom, claiming the right to do so through the permission given them by the original lessor; that neither the original lessee, McDonald, nor appellee, at any time ever intended to, or did, abandon the leased premises; that, before the bringing of this suit, appellants refused, upon demand, to cease drilling, and

agreed to save the original lessor harmless in any litigation that might arise touching the respective rights of the parties; that neither appellee McDonald, nor the original lessee, has at any time drilled or attempted to drill any other well, nor have they attempted to operate the well and produce oil therefrom, nor has either of them paid, or offered to pay, any money rent for the premises.

As conclusions of law, the court stated: (1) That the lease required an oil-producing well to be completed on or before October 30, 1899, without any payment of rent, and in case oil was not produced in paying quantities within that time, upon an obligation to rent at the rate of \$20 per annum, the lease was extended until October 31, 1900; (2) that appellee was, when the action was commenced, entitled to an injunction restraining appellants from operating for oil on the lands in question; (3) that the "restraining order should be continued for the period of thirty days from this date [February 12, 1901], and if, within that time, the rental at the rate of \$20 per annum shall be paid into court for the use of the party entitled thereto, the said injunction shall remain in force until May 1, 1901; and if before May 1, 1901, the plaintiff shall complete one or more wells so as actually to produce oil in paying quantities, then the said injunction shall be perpetuated so long as the plaintiff shall complete at least one productive well each year, and on failure of plaintiff to comply with conditions here prescribed the said injunction will, on motion, be dissolved."

Appellant's motion to modify and change the special finding, and to make additional findings, was properly overruled. Such a motion is not recognized by the code of procedure, and may properly be overruled, rejected, or stricken out by the court. *Bunch v. Hart*, 138 Ind. 1; *Banner Cigar Co. v. Kamm, etc., Brewing Co.*, 145 Ind. 266; *Windfall Nat. Gas, etc., Co. v. Terwilliger*, 152 Ind.

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364; *Smith v. Barber*, 153 Ind. 322; Elliott, App. Proc., §757.

For the same reason the motion to strike out part of the special finding was properly overruled. If the facts are found contrary to the evidence, the remedy is by motion for a new trial. *Sharp v. Malia*, 124 Ind. 407; *Tewksbury v. Howard*, 138 Ind. 103.

Appellant Chappell excepted to each conclusion of law. While there has not been upon this branch of the case, as claimed by counsel for appellee, a strict compliance with the rule as to briefs, yet we think the rule has been sufficiently complied with to present the question argued.

By the terms of the lease, the lessor was to have a certain part of all oil produced and saved from the premises leased, to be delivered in the pipe-line with which the lessee might connect the wells. The time when operations should begin is impliedly fixed by the provision that if a well is not completed within ninety days from August 1, 1899, the grant was to become null and void, unless the lessee should pay the lessor "twenty-five cents per acre annual rental, payable monthly, for each month" the completion of a well was delayed. The lease provides nothing as to how often a well should be drilled, or as to the number that should be drilled; nor does it, in terms, fix any time when it shall terminate. The finding shows that a well was commenced and oil found within ninety days from the date of the lease, but it does not show that a well was completed within the ninety days. The lease recites that the grant is for a valuable consideration, the receipt of which is acknowledged. This suit was brought August 25, 1900. From the finding it appears that when the suit was brought, the lease had not been forfeited, but was a valid lease as between the parties to this action, and was owned by appellee. What unsatisfied obligation, if any, existed at that time on the part of appellee, and in fa-

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vor of the lessor, was not presented by an issue in the case. The lessor was not a party to this suit. What right, if any, the lessor has to have the lease forfeited, was not presented. The lease contains no forfeiture clause for failure to operate the well, and what damage, if any, the lessor has suffered for failure on the appellee's part properly to develop the land, is a question between the lessor and appellee, and is not here presented. Whether the lease, upon failure to complete the well within the time fixed, was continued in force a definite time through the operation of some promise it contained, or whether appellee shall make certain payments to the lessor, or what other acts it should do that the lease may continue, are questions between the appellee and the lessor. The finding shows that the lease had not been forfeited when this suit was brought. Whether this finding is sustained by the evidence, is not presented, as the evidence is not before us. We can not treat any part of the conclusions of law as surplusage, because the judgment follows the conclusions as a whole.

Judgment reversed, with instructions to restate the conclusions of law.

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[No. 4,259. Filed February 17, 1903. Rehearing denied May 21, 1903.]

CHAMPERTY AND MAINTENANCE.—*Contracts.—Attorney and Client.*—A firm of attorneys and six property owners entered into a written agreement that each property owner should institute a suit for damages and injunction against defendants; that one case should be pushed by all, and if it should fail, each property owner should contribute his proportion of the costs, and if it should succeed, then each case was to be pressed for trial. The contract provided that the attorneys should receive no compensation unless successful, and if successful they should receive an amount equal to one-half of the sum collected by them. *Held*, that the contract was not champertous. *pp.* 185-186.

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INTOXICATING LIQUORS.—*Unlawful Sales.*—Where one licensed to sell liquor in a certain room provided tables in the grounds adjoining and employed young men, some of them minors, as waiters, who served the patrons at such tables, the waiters being supplied at the bar with tickets which they used in payment for liquors, and which were paid for by them at such rate that they received for their services ten cents for sales amounting to \$1.10, such sales, whether made by the waiters or by the licensee, were unlawful. *p. 188.*

NUISANCE.—*Intoxicating Liquors.—Injunction.*—Where, in a suit to enjoin as a nuisance a resort in which it was alleged intoxicating liquors were unlawfully sold, the evidence showed that the business conducted by defendant constituted a public nuisance which was specially injurious to the plaintiff, the continuation of the resort was properly enjoined without regard to the question as to the persons who made sales of intoxicating liquors in themselves unlawful. *p. 189.*

From Boone Circuit Court; *B. S. Higgins*, Judge.

Suit by Zimri C. Lewis against William Tron and another. From a judgment for plaintiff, defendants appeal. *Affirmed.*

J. B. Kealing, M. M. Hugg and S. M. Ralston, for appellants.

E. F. Ritter, for appellee.

BLACK, P. J.—This cause was commenced in 1898, in the Marion Circuit Court, from which the venue was changed to the court below. It was a suit of Zimri C. Lewis, the appellee, against the appellants, William Tron and the Terre Haute Brewing Company.

In the complaint it was shown that the appellee was the owner of a certain lot in the city of Indianapolis, on which was a house, No. 2520 North Capitol avenue, which was occupied, and for thirteen years had been occupied, as a residence by the appellee and his family, consisting of himself and his wife and their four children, two sons and two daughters, the oldest a daughter seventeen years of age, and the youngest a son five years old. The house contained nine rooms, and was well furnished and in good condition. It was in a locality thickly settled and devoted

to residence purposes. There were no manufacturing establishments or business houses within ten squares of it, except a few drug stores and groceries, and the business place of the appellants hereinafter mentioned. The people residing in the neighborhood were intelligent and well behaved, and but for the matters complained of against the appellants the appellee's premises would rent for \$25 per month, and for the five preceding years would have rented for that sum. It was charged that the appellants entered into collusion, for their personal profit, to establish and maintain a resort, mainly for the purpose of selling intoxicating liquors and inducing persons to visit such place, and there to buy from the appellants and drink such liquors, and for the purpose of furnishing a place where persons might congregate, especially in the evenings and nights and on Sundays, during the summer months, to buy of the appellants and drink such liquors in defiance of law. In pursuance of such plan and purpose, the appellants selected, as the place for such resort, a tract of land of about six acres, extending from Capitol avenue to Illinois street, about 500 feet along the north side of Fall creek, and extending north from the creek about 400 feet. This tract lay immediately across Capitol avenue from the appellee's residence. The Terre Haute Brewing Company, appellant, had owned this tract for about three years before the commencement of this suit. The appellants proceeded to improve and beautify the grounds by laying out grass-plats, walks, and driveways, and erecting at various places summerhouses of beautiful design and finish. They also erected two large buildings, one on the plan of a dwelling-house and the other designed for a clubhouse, the former having about fifteen rooms, one of them on the first floor, and fronting on Capitol avenue, being designated and used as a saloon and barroom, and the other rooms being arranged for the accommodation of men and women who desired to occupy them for the purpose of drinking intoxicat-

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ing liquors and indulging in lascivious conduct. Both of these buildings, it was alleged, were furnished and adorned in the most attractive manner, with wine-rooms. Scattered over the grounds at various places, were tables, seats, and other conveniences for the comfort of visitors. At night the grounds were lighted by about 350 incandescent electric lights, inclosed in glasses of different colors.

The grounds and buildings were designed to be and were attractive in appearance, and were constantly kept in that condition. On the west side of the premises, and directly across Capitol avenue from the appellee's residence, were two entrances for vehicles, bicycles, and persons on foot, and on the east side were other entrances used by pedestrians. In May, 1897, after the premises had been so prepared and beautified, they were thrown open by the appellants to the public, and by advertisements and otherwise the public were invited to resort there to buy and drink intoxicating liquors and for amusement; and ever thereafter great crowds of people from all parts of the city and vicinity resorted to and congregated upon the premises, day and night, the greatest crowds being at night and on Sundays. At times more than 5,000 people visited the place in one day. Every night and every Sunday, in pleasant weather, there had been a constant stream of people, in carriages, on bicycles, and on foot, entering and departing. All the carriages, and a large number of bicycles and pedestrians, entered and departed through the entrance directly opposite appellee's residence. Many of the visitors remained there until after 12 o'clock at night and until the early hours of the morning. The appellants kept in their employ a band, which furnished music for the entertainment of visitors every evening, until late at night. The appellants sold intoxicating liquors without restraint and in violation of the law at all hours to the persons thus assembled on their premises, which were drunk thereon by such persons, and were served

by the glass at the tables upon the grounds and in the rooms of the buildings. Prostitutes and their male associates frequented the premises, and many of the persons so assembled became intoxicated upon the liquors so sold, and while in such condition indulged in loud talking and profane and obscene language, and continued such conduct until late at night. The persons entering and departing were noisy and disorderly, many of them shouting, laughing, and using profane and vile language. All the things thus alleged to have been done on the premises were of daily and nightly occurrence during the warm weather, and also in cold weather, except that then there were smaller crowds, and the most of the things done were confined to the buildings. The noises and disturbances which took place, and the singing and shouting, and vile and profane language, were plainly heard by the appellee and his family in their residence, and such noise and conduct of the persons on the premises, and of those entering and departing, were a constant disturbance and annoyance, offensive and disquieting to appellee and his family, and a damage to his enjoyment of his residence, and he and his family were kept awake at night, and kept in constant fear and dread of injury from drunken men. The location, conduct, and manner of conducting the business and resort, the great numbers visiting it, the open and public violation of the law, in the sales of intoxicating liquors, the bad character of Tron, the wealth, influence, and determination of the other appellant in its business enterprises, its ownership of the real estate and interest in the establishment and maintenance of the business, the demoralizing influence of the business and resort, had become matters of public and general conversation and comments in the newspapers of the city and elsewhere throughout this State, and had given the place and business great notoriety throughout the city and State, and had caused disgrace and odium, and had given to the neighbor-

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hood and locality of the business, including the appellee's residence, a bad reputation and character, and had created a prejudice against the same, and thereby had destroyed the rental value of the appellee's property for residence purposes and the enjoyment of the appellee in it as a home-stead. It was further alleged that the appellants had recently erected and were using a building for theatrical exhibitions, which was situated on said premises immediately upon Capitol avenue, with an entrance on that street directly opposite the appellee's residence. This building included a stage and dressing-rooms, the place for the audience being enclosed in a tent. Performances were given there in the afternoon and evening of every day except Sunday, and it was alleged that the appellants intended to continue such daily performance during the entire summer. Large crowds attended the performances, and assembled in the tent and indulged in loud cheering and shouting. It was alleged that on account of all the things thus averred the appellee was damaged in the sum of \$5,000; that appellants had invested large sums of money in the enterprise, and intended to maintain and enlarge it upon the same lines, to the irreparable injury of the appellee's property and his enjoyment thereof. Prayer for judgment for said amount, and that the appellants be enjoined from the further conduct of the business at that place.

The appellants answer separately by general denial. Appellant Tron also separately filed two paragraphs of answer, demurrers to which were sustained.

It is contended that the third paragraph of Tron's answer contained a good defense. In this paragraph it was alleged that prior to the commencement of this action the appellee and certain other persons entered into an agreement with the copartnership of Ritter & Baker, composed of Eli F. Ritter and Jason E. Baker, attorneys at law. This agreement was as follows: "We, the undersigned,

in consideration of mutual interests and protection of our homes, families, and property, do hereby enter into the following agreement: (1) We will each institute a suit against the resorts known as 'Kissels' and 'Fairbanks,' situated in the immediate neighborhood of our homes, for damages and injunction as nuisances. We will concentrate our forces upon one case, to be pushed as rapidly as possible, for which trial we will carefully produce all the evidence we can secure, and give to such trial our careful attention; and if the plaintiff shall fail and be taxed with the costs of such trial, we hereby bind ourselves respectively to contribute each of us his proportion of such costs. If upon such trial the plaintiff is successful, then each of our cases is to be pressed for trial. In the event the plaintiff is defeated in said case first to be tried, then neither of us does hereby bind himself to go any further with the proceedings in the other cases, unless upon further consideration he shall decide to do so. (2) For the purposes of the suits referred to in this agreement, we do each hereby employ the firm of Ritter & Baker as attorneys, upon the following terms: Said firm to investigate and bring such suits and conduct the trial of said test case herein provided for, as well as the other cases if they shall proceed to trial, to do whatever may be necessary to be done as attorneys in the conduct of said cases to the final determination thereof, and if they shall fail to secure judgments and collect the same, then we and neither of us are to be in any way responsible to them for any fee or compensation for their said services; but if successful in obtaining judgments and collecting the same, the said firm is to have an amount equal to one-half of such sum as may be collected by them." This was dated March 26, 1898, and was signed by said attorneys and the appellee and five other persons. It was alleged in the third paragraph of answer that the place described in this agreement as a resort known as "Fairbanks" was the same place alleged in the complaint

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to have been and to be conducted by the appellants; that pursuant to this agreement, and none other, the appellee brought this action by and through said Ritter & Baker as his attorneys. After stating the purport of the terms of the agreement relating to compensation of the attorneys, it was alleged that it was contemplated in the minds of the parties to the contract that such amount to be paid to the attorneys should be paid out of the moneys actually recovered and collected in this action, and none other; that such contract was and is against public policy; and that this action, brought pursuant thereto, is speculative and champertous.

The parties to the contract having reduced its terms to writing, signed by them, thereby made it the expression of their intentions in the premises. Not only were their oral negotiations merged in the written instrument, but also whatever was contemplated in their minds concerning the purposes of the parties to the contract was evidenced by the terms employed in the writing, by the legal effect of which, interpreted according to their ordinary signification, the purport of their contract must be ascertained. As between themselves, they would not be permitted to say that they or either of them intended an effect different from the meaning of the words employed, nor can such a contrary effect be attributed to the contract by one not a party to the contract, and not alleging the making of any subsequent contract. As to the proper effect of an allegation of fraudulent collusion in the framing of such a contract, the case presents no occasion for deciding.

The attorneys were engaged to bring and manage an action for each of the other parties for damages and for injunction. None of the parties were to obtain or recover any part of the amount recovered as damages in any of the contemplated actions, except the plaintiff therein, the real party in interest, though all of them, except the attorneys, were interested in preventing by injunction the continued

maintenance of the nuisance. The attorneys were not to carry on the suit at their expense, and were not to be liable for the costs in any event. They were not to receive as their fee in each case a sum out of the damages recovered by the plaintiff or a share of such damages, but the plaintiff in each case was bound personally to the attorneys for an amount equal to one-half of the sum collected for such plaintiff. This was the ordinary and legitimate contingent fee. Each of those who engaged to share with the appellee in the payment of costs, if he should fail and should be taxed with the costs, had an interest of his own in the success of this suit, not by way of sharing in the damages recovered herein, but in the prevention by injunction of the continuance of the nuisance, and in the determination by the decision of the court of the questions which affected all such parties, respectively, in their several suits.

If the contract in question were obnoxious to the charge of champerty or maintenance, there would be a question as to whether it might properly be set up as a defense in this action, upon which question the authorities are not in full accord. We need not enter upon an investigation of the subject, for we are of the opinion that the contract is not thus objectionable. Any interest whatever in the subject of the action, though contingent and remote, or even the possibility of an interest, exempts one who aids the litigant from the charge of illegal maintenance. See 5 Am. & Eng. Ency. Law (2d ed.), 820.

An agreement to contribute to the expenses of litigation in which the person so agreeing is interested, or may reasonably suppose himself to be interested, by reason of having an interest in the question at issue, is not a champertous agreement or one subject to the charge of maintenance. *Davies v. Stowell*, 78 Wis. 334, 47 N. W. 370, 10 L. R. A. 190; *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38; *Williams v. Fowle*, 132 Mass. 385.

The court upon the trial found in favor of the appellee;

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that he was entitled to recover from the appellant Tron \$200, "as damages for injuries to and interference with the comfortable enjoyment of the plaintiff's home and real estate, described in his complaint, by reason of the acts of the defendant William Tron therein complained of;" that the appellee was entitled to a perpetual injunction against Tron, enjoining him from the sale, directly or indirectly, of intoxicating liquors upon the grounds described in the complaint, and known as "Fairbanks," except in the room situate thereon and described in Tron's license as No. 2525 Capitol avenue north; that the appellant the Terre Haute Brewing Company be perpetually enjoined from permitting or suffering the real estate to be used for the sale of intoxicating liquor thereon, except in said room, and from leasing said ground for the purpose of such selling thereon except in said saloon room. Judgment accordingly followed.

The separate motions of the appellants for a new trial were overruled, and the other questions presented here relate to matters stated as causes in those motions.

The finding of the court was sustained by sufficient evidence to support it on appeal, and was not contrary to law. There was evidence tending to support all the material averments necessary to the recovery awarded. Comparing the complaint with the evidence, it may be said that the complaint stated the facts intensely, and perhaps with some degree of exaggeration, but that the evidence bore out the allegations with sufficient certainty on all the material matters. Having taken space for the statement of the substance of the complaint, we need not recite the evidence, which was voluminous. It showed that Tron maintained a public nuisance on the real estate leased to him for such purpose by his codefendant, which was specially injurious to the appellee, injuring and interfering with his comfortable enjoyment of his property as a home for himself and his family, for which special injury the damages were

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assessed. Such damages were so far within the province of the trial court that we can not disturb the finding because of the amount of damages awarded. There has been some discussion of the method resorted to for the purpose of supplying intoxicating liquors to visitors on the grounds outside of the room to which the license for the sale of such liquors related, the license not protecting from the charge of unlawfulness sales of such liquors except in the licensed room.

The liquors were delivered to patrons at tables, of which there were about 100 in the grounds, by waiters, young men, some of them minors. The waiters were supplied at the bar in the house with tickets or tokens, which were paid for by the waiters at such rate that they received tickets of a face value, in the payment for liquors, ten per cent. greater than the amount paid for them by the waiters. When liquors ordered by patrons were received by the waiter at the bar for delivery on the grounds, he gave in exchange therefor such tickets at their face value, being the price paid to the waiter by the patron; the waiter thus receiving compensation for his service for Tron out of the moneys received from the patrons by the waiter for the liquors sold. If such sales on the grounds could properly be called sales by the waiters, and not by Tron, as seems to be claimed, they would still be unlawful sales, knowingly made possible and authorized and promoted by Tron, and he would be chargeable personally for his own unlawful sales at the bar to waiters who were minors. This method of carrying on the establishment was a skilful device for security against dishonesty of the waiters, and for making payment for their services at the rate of ten cents for sales amounting to \$1.10, and probably was used in part, if not wholly, for such purposes. If it was supposed to operate also as an evasion of the law, it could only succeed as such with those who were blind to the requirements of the law.

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It would not be complimentary to the worldly wisdom of the courts to expect them to be cheated by such a device.

But, without regard to the question as to the persons who made sales in themselves unlawful, the establishment was carried on by Tron in such manner as to constitute a public nuisance specially injurious to the residents of the neighborhood. It was necessary and proper to enjoin the prosecution of this unlawful method of carrying on the business on the grounds outside of the licensed room, in order to terminate the disturbances and annoyances to which the law-abiding neighbors were unlawfully subjected. The injunctive relief granted did not go to the extent authorized by the decisions in *Haggart v. Stehlin*, 137 Ind. 43, 22 L. R. A. 577, and *Kissel v. Lewis*, 156 Ind. 233.

There has been discussion before us of the action of the court in sustaining and in overruling objections in the examination of witnesses on the trial. We have carefully considered these matters, and conclude that there was no available error in any of them, and this is so clearly true that no general interest would be subserved by using the considerable space which would be necessary to discuss these various rulings.

Judgment affirmed.

ANDREWS v. ANDREWS ET AL.

[No. 4,680. Filed May 22, 1903.]

LIFE ESTATES.—Royalties from Oil Wells.—Gas and Oil Lease.—Where testator leased lands for oil, and two oil-wells were in operation at the time of his death, the devisee of the life estate is entitled to the royalties accruing from wells drilled under the provisions of the lease, after the death of testator, as well as from those drilled prior to the death of testator.

From Huntington Circuit Court; *Levi Mock*, Special Judge.

Action by Ensley G. Andrews against Amy A. Andrews and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

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C. W. Watkins, H. C. Morgan, M. L. Spencer, W. A. Branyan and H. B. Spencer, for appellant.

U. S. Lesh, Eben Lesh, J. B. Kenner and Branyan & Feightner, for appellees.

ROBINSON, J.—Transferred from the Supreme Court under the act of March 12, 1901.

In 1889 Calvin Andrews executed his will, devising to appellee Amy Ann Andrews, his wife, a life estate in certain lands, with remainder over to appellant and others. In 1895 Calvin Andrews executed a lease on the lands, by which, for a consideration, he hereby "grants unto" the lessee "all the oil and gas in and under" the lands mentioned, "with the right to enter thereon at all times for the purpose of drilling and operating for oil or gas," to erect buildings, lay pipes, etc., the lessor to have one-eighth of all oil produced and saved; in case no well was completed within ninety days from the date of the instrument, then the grant to be null and void, unless the grantee or lessee shall pay at the rate of a named sum annually for each year completion is delayed. Andrews died in 1898, and at that time two oil-wells had been drilled by the assignee of the lessee and were in operation. Since his death four additional wells have been drilled, and one-eighth of the oil from all the wells has been delivered to appellee. Appellant, as one of the remaindermen, sues for his share of the royalties received by appellee.

Because of the peculiar character of oil and gas, decisions in mining cases concerning minerals that have a fixed *situs* are not controlling in contracts concerning them without some modification. The owner of land owns absolutely the coal lying beneath the surface. And while a landowner has certain property rights in gas and oil in the ground, because while in the particular ground they are a part of the realty, yet he can not be said to be the absolute owner until he has reduced them to possession. His property in them is lost if they escape and go into other land,

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and they may become the property of an adjoining landowner by being reduced to possession by him through a well drilled on his own land. See *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 155 Ind. 461, 50 L. R. A. 768; *Richmond Nat. Gas Co. v. Enterprise Nat. Gas Co.*, *post*, 222; *Brown v. Spilman*, 155 U. S. 665, 39 L. Ed. 304, 15 Sup. Ct. 245.

A tenant for life, being entitled to the profit of the land, is entitled to the royalties from the wells that were opened and in operation when the life estate commenced. *Westmoreland Coal Co.'s Appeal*, 85 Pa. St. 344; *Sayers v. Hoskinson*, 110 Pa. St. 473; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 56 Am. St. 884, 31 L. R. A. 128; *Lynn's Appeal*, 31 Pa. St. 44, 72 Am. Dec. 721; *Freer v. Stotenbur*, 36 Barb. 641; *Bryan, Petroleum & Natural Gas*, 41 *et seq.*; *Rogers, Mines & Quarries*, 257; *Gaines v. Green, etc., Mining Co.*, 33 N. J. Eq. 603; *Moore v. Rollins*, 45 Me. 493; *Clift v. Clift*, 87 Tenn. 17, 9 S. W. 360; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263; *Crouch v. Puryear*, 1 Rand. (Va.) 258, 10 Am. Dec. 528; *Barringer & Adams, Mines & Mining*, 8; *Hendrix v. McBeth*, 61 Ind. 473, 28 Am. Rep. 680.

In *Hendrix v. McBeth*, *supra*, a decedent in his lifetime leased certain lands for mining coal, and the lessee sunk a shaft and began the mining of coal. At his death, testate, his widow took, under the statute, one-third of the land for life. The executor, empowered to collect the rents and profits of the land for certain purposes, had received two-thirds of the royalties, and sued the lessees and widow for the remaining one-third. It was held that the widow was entitled to the one-third of the royalties. And it is the general common law rule that where there have been no operations for oil commenced on the land before the estate for life accrued, the life tenant has no right to operate for oil, nor can he give such a right to any lessee from him. *Appeal of Stoughton*, 88 Pa. St. 198; *Westmoreland Coal*

Co.'s Appeal, supra; Blakley v. Marshall, 174 Pa. St. 425, 34 Atl. 564; *Marshall v. Mellon*, 179 Pa. St. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. 601.

Appellant's counsel rely chiefly upon the two cases last cited. In neither of these cases had there been any operations for oil prior to the beginning of the life estate. In *Blakley v. Marshall, supra*, the lease was made by lessors who were life tenants, and also as trustee for those in remainder; that is, all the interests concurred in making the lease. It was held that the life tenants were entitled to the interest on the proceeds from royalties during their joint lives and the life of the survivor, and at the death of the latter the principal was payable to the remaindermen. In *Marshall v. Mellon, supra*, this doctrine was approved, and it was held that the life tenant could not enforce the terms of a lease executed by him for gas and oil purposes.

While a tenant for life, subject to waste, can not open a new mine, yet he may open the earth in new places to reach a mine which had been worked before the beginning of the life estate. Sinking a new pit on the same vein is not necessarily the opening of a new mine. *Clavering v. Clavering*, 2 P. Wms. 388; *Bagot v. Bagot*, 32 Beav. 509; *Elias v. Snowdon, etc., Co.*, L. R. 4 App. Cas. 454, 465. The reason underlying this doctrine is that where the owner of the fee in his lifetime has opened and worked a mine, he has made it a part of the profits of the land. *Viner v. Vaughan*, 2 Beav. 466. However, it seems to be immaterial whether the mine opened by the owner of the fee produced a profit or not. If the owner of the fee in his lifetime has opened the mine, even though he may have discontinued working upon it for a number of years prior to his death, the life tenant has a right to use the mine for his own profit. *Elias v. Griffith*, L. R. 8 Ch. Div. 521. But the distinction is recognized between a discontinued working of a mine consisting of a mere cessation of work, and an abandonment with an executed intention to devote

the land to some other use. In the former case the life tenant's right to operate the mine is not defeated, while in the latter case it is. *Barringer & Adams, Mines & Mining*, 8, and cases cited.

In *Billings v. Taylor*, 10 Pick. 460, 20 Am. Dec. 533, the court said: "Whatever doubts may have been formerly entertained, it seems now to be well settled, that a widow is entitled to dower in such mines and quarries, as were actually opened and used during the lifetime of the husband, and it makes no difference whether the husband continued to work them to the period of his death, or whether they have been continued since his death by the heir or his assignee." And in *Neel v. Neel*, 7 Harr. (Pa.) 323, it is said: "It seems in this case that the author of the gift had sometimes sold coal out of the pits, but I do not conceive this to be material. It is sufficient that he opened them and derived any profit from them, even if it were only fire bote * * *. And the decisions refer to coal mines, * * * iron mines, * * * and the tenant for life may work them, even though the working of them may have been discontinued before the death of him through whom the estate comes * * *. And if necessary to the proper working of them, to make new openings in the ground." See also *Coates v. Cheever*, 1 Cow. 460.

In the case at bar the lease was executed before the beginning of the life estate, and gave the lessee the right to operate for oil upon the land, and to take all the oil found upon the payment of a certain royalty. If a well was not commenced within a certain time, the lease was void, unless the lessee should pay a certain annual sum during the delay. The instrument was not acknowledged, and from its whole tenor does not attempt to do more than lease the lands for gas and oil purposes. The validity of the lease and the lessee's right to operate wells are not questioned. The lease is valid and was in force at the begin-

ning of the life estate, and under its provisions the lessee may open and operate such wells as he chooses.

If no wells had been drilled, and the lessees had paid the stipulated annual rental to the testator up to the time of his death we think it clear that this rental would be payable to the life tenant during the delay in beginning operations. And if the whole territory had been developed and the wells in operation under the lease prior to the time the life estate accrued, the royalty, as we have seen, would be payable to the life tenant. The life tenant's right to the rents and profits from open wells rests upon the lawfulness of the severance and conversion of the oil into personalty under the lease. Although the additional wells had not been drilled, yet the right to drill them existed at the beginning of the life estate. The life tenant has not attempted to grant any new right. The additional wells are not opened by any authority from her. They may be opened by virtue of the lease without reference to her wishes in the matter. The opening of new wells under the lease is practically the act of the testator. He authorized the act by the lease, and in contemplation of law the wells may be treated as already opened when the life estate accrued.

In *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 31 L. R. A. 128, 56 Am. St. 884, the court said: "A mine lawfully leased to be opened is an 'open mine,' within the reason of the rule as laid down in these cases; and when lawfully opened and worked, as in this case, during the time that the freehold estate of the life tenant continues, the profits issuing therefrom, thus lawfully severed and produced, belong of right to him; for the term 'profit' in law, comprehends the produce of the soil, whether it arises above or below the surface, including product of mines, as well as the herbage growing on the surface." To the same effect is *Priddy v. Griffith*, 150 Ill. 560, 37 N. E. 999, 41 Am. St. 397.

Judgment affirmed.

Town of Crown Point v. Thompson.

TOWN OF CROWN POINT v. THOMPSON.

[No. 8,818. Filed October 28, 1902. Rehearing denied May 26, 1903.]

MUNICIPAL CORPORATIONS.—*Obstruction of Street.*—*Notice.*—*Contributory Negligence.*—A complaint against a town for personal injuries, caused by the alleged negligence of defendant in permitting a large flag to be suspended in a principal street, which frightened plaintiff's horse as she attempted to drive under it, and caused the horse to run away and injure plaintiff, shows, on its face, that plaintiff was guilty of contributory negligence in attempting to drive under the flag, and was bad against demurrer. *pp.* 195–200.

APPEAL AND ERROR.—*Briefs.*—*Rehearing.*—It is too late for appellee to appear for the first time and file a brief after the case has been decided. *p.* 201.

From Porter Circuit Court; *A. D. Bartholomew*, Special Judge.

Action by Maggie A. Thompson against the town of Crown Point. From a judgment for plaintiff, defendant appeals. *Reversed.*

W. C. McMahan, for appellant.

T. J. Wood, for appellee.

HENLEY, P. J.—Appellant prosecutes this appeal from a judgment rendered by the Porter Circuit Court, in favor of appellee against the appellant, for \$450. Her action was for damages for personal injuries sustained by her by being thrown from her buggy while driving on appellant's streets, it being alleged that her horse became frightened and ran away on account of an obstruction permitted by appellant to remain in its streets.

The complaint was in three paragraphs, which were substantially the same in so far as they relate to the question herein discussed and decided. The first paragraph of the complaint, omitting the caption, is as follows: "The plaintiff in said cause, Maggie A. Thompson, complains of the defendant the town of Crown Point, and avers that she

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is now the wife, and was the wife on June 3, 1897, of David H. Thompson, and that their home is, and was at said date, near Leroy, Lake county, Indiana. The defendant the town of Crown Point was a municipal corporation in the month of June, 1898, and was such corporation many years prior to that date, and is now such municipal corporation, organized under the laws of the State of Indiana, and is known as the county seat of Lake county, Indiana. The plaintiff further avers that said defendant did, in the month of May, 1898, permit to be put up a large United States flag, to wit, forty feet long by twenty-five feet wide, by means of a rope attached to said flag, over Main street, and across the same at a point opposite the court-house, on the public square, and George Strabel's grocery store, on the east side of Main street, so that the same hung within six feet of the ground or street, and wrongfully and negligently permitted the same to remain up, with full knowledge thereof; that said flag wrongfully and negligently so suspended reached nearly across said street, and waved in folds and fluttered in every breeze many times a day, and said flag continued suspended in the manner and form aforesaid with the full knowledge, permission, and consent of the said defendant, its trustees, and officers, for a period of thirty days from the time it was put up, in the month of May, 1898; that Main street at the place aforesaid was on said date, and since said time, the main business thoroughfare or street in the said town of Crown Point, and the same was then generally traveled by horses and carriages, horses and wagons, and was then the most frequented with teams and carriages of any other place or street in the said town of Crown Point, and that said place where said flag was hung and left flying was then a continual business place, on account of the trade and traffic going on all the time with the many and various stores on the east side of said Main street, and in the immediate vicinity of said waving flag; that said flag, whether waving or not, was a

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dangerous obstruction to said street, and to the traffic at said place on said street, in this, that it caused trusty and gentle horses to become frightened and unmanageable by the drivers, and that the same was an object that would frighten and make unmanageable all kinds of horses drawing loaded wagons, carriages, or vehicles of any kind or description, when driven or standing upon said street at the place where said flag was suspended as aforesaid and in the vicinity thereof. The plaintiff further avers that on the 3d day of June, 1898, she drove a well-broken and gentle farm horse along said Main street, hitched to a top carriage, where she had business to do, and near to and at the place where said flag was wrongfully, negligently, and unlawfully suspended, which was fully known to the said defendant and its officers, and where said defendant carelessly, wrongfully, negligently, and unlawfully permitted it to be suspended, and the said flag waving, when said plaintiff's horse approached the same to go under it or by it, became frightened and unmanageable, and violently shied to one side of said street where said flag hung, and caused the said carriage to collide with another vehicle, which caused her said carriage to upset and throw her (the plaintiff) violently to the paved street at the place where the said flag was negligently suspended, and which caused her great and severe physical injuries, to wit, to her head, which struck the pavement with great force which bruised the scalp and flesh and muscles of the head, and completely stunned her and made her unconscious, and she remained unconscious for several consecutive hours, and her collar bone was broken and greatly injured, and the flesh on her shoulders and the joints thereof were greatly bruised and injured; and that all of said injuries are permanent, and she is suffering great pain and sickness from said injuries at the present time, and that the same caused and doth now cause her a permanent disability, in this, that she is unable to move around with health and strength, and unable to

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do any kind of work, and she suffers with sickness continuously on account of pain in her head, shoulders, and chest; that said injury was caused without any fault or negligence by plaintiff, and she did not in any manner contribute thereto. The plaintiff further avers that because of said injuries her health failed, and she is now so bad that she can not work and perform her household duties, and that she was attended by skilful physicians from the time of said injuries for and during the period of six months, and since that time she has used and is now using various medical remedies to stop her pain; that she has paid out \$100 for medical attendance and for medicine. The plaintiff further avers that she was, and for a long time before the time of said injury had been, a good and careful driver of a horse, and of horses generally, and that she frequently drove the said horse from her home, near Leroy, to Crown Point, and safely returned home. Plaintiff demands judgment against the defendant for said injuries, on account of the said wrongful and negligent conduct of said defendant in permitting said flag to remain across said Main street, in the sum of \$4,000, and she demands all other proper relief."

The specification of the assignment of errors is that the trial court erred in overruling the demurrer to the first paragraph of the complaint. Counsel for appellant argue that the complaint discloses that the appellee was guilty of contributory negligence. The complaint shows that the flag was suspended in a most public place; that the appellee could and did see it, and if the flag was a dangerous obstruction in the street, and, whether waving or not, was liable to frighten her horse, as her complaint avers, then she has disclosed her knowledge of the obstruction, and of its danger, and her means of knowing the danger. Being acquainted with both the surroundings and the horse she was driving, her knowledge of the danger was at all times greater than that of appellant.

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In the case of *Town of Salem v. Walker*, 16 Ind. App. 687, this court said: "When appellee's horse became frightened at first sight of the obstruction, the appellee was fully apprised of the danger. Had the injury occurred when the horse first came upon the obstruction, the appellee would have a far different case from the one presented by this record. He was under no compulsion to urge his horse a second time up to the object. He voluntarily and unnecessarily encountered the danger, and it can not be said that he was exercising ordinary prudence in doing so, but that he did so at his own risk." The judgment of the trial court in the case cited was rendered upon the evidence, because, as is shown from the quoted part, the injured person knew of the danger. The evidence adduced upon the trial disclosed his knowledge of the danger which he voluntarily encountered, while in the case at bar the complaint discloses appellee's knowledge of the danger, if any, from the defect or obstruction in the street.

The statement of the rule of law governing cases of this kind made by the Supreme Court in the case of *Town of Gosport v. Evans*, 112 Ind. 133, 2 Am. St. 164, has been often cited and approved. In that case Mitchell, J., speaking for the court, said: "The authorities, however, lend no countenance to the notion that a person having knowledge of an obvious defect, or of a place in a highway which naturally suggests to a person of common understanding that it is dangerous, may, nevertheless, voluntarily cast himself into or upon the defect, upon the theory that he is not obliged to forego travel upon the highway. In *Horton v. Inhabitants of Ipswich*, 12 Cush. 488, the court said: 'The real point is, not whether the plaintiff was chargeable with any negligence in making his way over the road, after he had entered upon it; but whether he knew, or had reason to believe, that the road was dangerous, when he entered on it, or before he reached any dangerous place. If so, he could not,

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in the exercise of ordinary prudence, proceed and take his chance, and if he should actually sustain damage, look to the town for indemnity.' *Parkhill v. Town of Broghton*, 61 Iowa 103. 'Where there is danger and the peril is known, whoever encounters it voluntarily and unnecessarily can not be regarded as exercising ordinary prudence, and therefore does so at his own risk.' *Corlett v. City of Leavenworth*, 27 Kan. 673; *Schaefer v. City of Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533. If the defect in the pavement, which the plaintiff voluntarily encountered, presented an obstruction, or was of such a character that the town of Gosport was bound to take notice of it, so that it was guilty of negligence in not repairing it, the conclusion follows necessarily that the plaintiff, having full and equal knowledge of its character, was guilty of contributory negligence in venturing upon it, no matter how carefully she may have prepared for the encounter, nor with how much care she went upon it. Her duty was to avoid the obstruction, or venture upon it at her own risk. *Durkin v. City of Troy*, 61 Barb. 437."

And so we might paraphrase a part of the language of Judge Mitchell, and say that if the flag presented such an obstruction in the street that the town of Crown Point was guilty of negligence in not removing it, we must, in all justice, conclude that appellee having full and equal knowledge of its character was guilty of contributory negligence in venturing under it. Applying the law, as here stated, to the averments of appellee's complaint, we must hold each paragraph of this complaint insufficient.

Judgment reversed, with instructions to the trial court to sustain appellant's demurrer to the first, second, and third paragraphs of complaint.

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ON PETITION FOR REHEARING.

HENLEY, J.—Counsel for appellee did not file a brief in this case prior to its decision, and now for the first time, upon petition for a rehearing, seeks to discuss the questions argued by counsel for appellant. It is too late for counsel for appellee to appear after the case has been decided. *City of Bedford v. Neal*, 143 Ind. 425.

The petition for a rehearing is overruled.

BALTIMORE AND OHIO RAILROAD COMPANY ET AL.
v. WABASH RAILROAD COMPANY.

[No. 4,276. Filed May 26, 1903.]

RAILROADS.—*Crossings*.—Where a railroad in process of construction commences proceedings to acquire the right to cross the tracks of an established operating railroad, the crossing over grade, under grade, or at grade, refers to the crossing by the new road of the old. pp. 207, 208.

SAME.—*Crossings*.—Pending a proceeding by plaintiff to condemn a crossing over the tracks and right of way of defendant an agreement was entered into by the parties to submit to commissioners the question whether a grade or over-grade crossing should be established. *Held*, that a crossing by carrying the tracks of plaintiff under the tracks of defendant was not within the meaning of the agreement of submission. pp. 202-208.

SAME.—*Crossings*.—*Agreement*.—Railroads have the right to agree as to the manner of making crossings and proceed with the work without going into court, and may, when a proceeding is brought in court to establish a crossing, agree upon the terms under which their respective rights shall be determined, and an agreement so entered into, will, in the absence of fraud, be enforced. pp. 208-210.

From DeKalb Circuit Court; *P. V. Hoffman*, Special Judge.

Proceeding by the Wabash Railroad Company to obtain a crossing over the tracks of the Baltimore & Ohio Railroad Company. From a judgment establishing the crossing, defendant appeals. *Affirmed*.

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J. H. Collins, M. Winfield, J. E. Rose, J. H. Rose, W. H. H. Miller, J. B. Elam, J. W. Fesler and S. D. Miller, for appellant.

E. P. Hammond, W. V. Stuart, D. W. Simms and A. C. Harris, for appellee.

HENLEY, J.—This was a proceeding under the general railroad act, commenced in the DeKalb Circuit Court, by the appellee, for the purpose of condemning a crossing over the track and right of way of appellant, the Baltimore & Ohio & Chicago Railroad Company, being operated by the appellant, the Baltimore & Ohio Railroad Company. The point of crossing being in DeKalb county.

Appellee filed its instrument of appropriation in the office of the clerk of DeKalb county on the 21st day of April, 1901, and in addition to the instrument of appropriation, appellee filed its petition in the clerk's office, wherein it recited the instrument of appropriation, and that it desired and proposed to make such condemnation, and asked that the court, or judge thereof in vacation, appoint three appraisers to assess the damages. In addition to the appellant railway companies, the United States Trust Company of New York and John A. Stewart, trustees, were made defendants. Proper notice was served upon the defendants to the action of the time and place where the same would be heard. On the 23d day of September, 1901, the hearing was commenced before a special judge, the regular judge being incapacitated on account of sickness. After the matter had been partially heard, plaintiff and defendant railway companies, appellants and appellee in this court, entered into an agreement, which, omitting the parts not necessary to be considered in disposing of this appeal, was in the following words:

“State of Indiana, DeKalb County, ss. In the DeKalb Circuit Court. The Wabash Railroad Company v. The Baltimore & Ohio Railroad Company and the Baltimore & Ohio & Chicago Railroad Company, and the

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United States Trust Company of New York and John A. Stewart, of New York, Trustees. Before Hon. P. V. Hoffman, special judge in vacation. Pending said proceedings before said judge, it is hereby agreed between said plaintiff, the Wabash Railroad Company, and said defendants, the Baltimore & Ohio Railroad Company and the Baltimore & Ohio & Chicago Railroad Company, in settlement of all matters in dispute in said proceeding, that said special judge shall, within twenty days of this date, appoint three disinterested commissioners, expert, railroad civil engineers, one of such commissioners to be named by said plaintiff the Wabash Railroad Company within ten days of this date, and one of such commissioners to be named by said defendants, the Baltimore & Ohio Railroad Company and the Baltimore & Ohio & Chicago Railroad Company within ten days of this date, and the two commissioners so named by said parties to select the other commissioner, or, upon the failure of said two commissioners, so selected by said parties, to choose a third commissioner within said time, then said special judge to appoint such third commissioner, to be an expert railroad civil engineer, impartial and disinterested. And said parties making this agreement hereby waive all questions as to the residence or proper qualifications of said commissioners.

“It is further agreed that a certified copy of this agreement, and the order of the special judge thereon shall be issued by the clerk of the DeKalb Circuit Court of Indiana, under his hand and the seal of said court, to such commissioners on their appointment; that said commissioners shall take an oath before some officer qualified to administer oaths that they will faithfully and impartially discharge their duties; that said commissioners, at some time not more than twenty days after their appointment, shall, in company with one representative of said plaintiff, and one representative of both of said defendants, the Baltimore & Ohio Railroad Company and the Baltimore & Ohio & Chi-

cago Railroad Company, proceed to examine the proposed crossing mentioned in the instrument of appropriation herein of said plaintiff, and shall make such examinations, levels and surveys of said place and vicinity as shall enable them to make a report that will do fair and impartial justice to all the parties herein; that in their report said commissioners shall find and report whether an over-grade crossing at the place in question by said plaintiff will be reasonable and practicable, and, if they shall so find, they shall report that said plaintiff shall construct and maintain an over-grade crossing at said place, and shall also, in such event, assess the damages that said defendant railroad companies will sustain on account of such over-grade crossing; the length, width, and height of such over-grade crossing to be determined by such commissioners, and stated in their report, which report shall be filed within ten days of their said meeting.

“But if said commissioners shall find that an over-grade crossing at said place is not reasonable and practicable, they shall so state in their report, and in such case shall find that a crossing at grade should be established at said place, and shall assess the damages which said defendants shall sustain by reason of such grade crossing; that in case said commissioners should find and report that there should be a grade crossing, they shall assess damages on the theory that an interlocking plant shall be constructed, maintained, and operated at said place, wholly at the expense of said plaintiff the Wabash Railroad Company; said interlocking plant to be upon plans and specifications that shall be approved by the Auditor of the State of Indiana. * * *

“It is further agreed between the parties that said commissioners on completing their report as herein provided, shall file the same with the clerk of the DeKalb Circuit Court of Indiana, and such report shall be final and conclusive upon all the parties herein, without any right of exception thereto or appeal therefrom, and that such report if made

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during a term of the said DeKalb Circuit Court, shall be entered in full upon the records of said court, and the said court shall enter a decree thereon accordingly, or, if not filed during a term of said court, that like proceedings shall be had at the first term of said court thereafter.

“It is further agreed by the parties that all the expense herein, including such reasonable compensation for said commissioners as shall be allowed by said DeKalb Circuit Court, shall be paid by said plaintiff, and also that all damages, if any, which shall be assessed by said commissioners, either for a grade, or over-grade crossing, shall be paid by said plaintiff the Wabash Railroad Company, to the clerk of the DeKalb Circuit Court, within thirty days after said commissioners shall have made and filed their said report. * * *

“In witness whereof, said parties, by their attorneys, engaged in said proceedings, have signed this agreement in triplicate this 24th day of September, 1901. The Wabash Railroad Company, by Stuart, Hammond & Simms, Attorneys for said company. The Baltimore & Ohio Railroad Company, The Baltimore & Ohio & Chicago Railroad Company, by J. H. Collins, and J. E. & J. H. Rose, Attorneys for said companies.”

Under this agreement the parties named their respective commissioners, who selected a third, and the three were appointed by the court, and qualified and entered upon their duties under an order of the court drafted and agreed to by all the parties to the action, and entered upon the records of the court; being based in all respects upon the foregoing agreement of said parties. Afterward, and before the commissioners reported, appellants moved the court to strike out and expunge from its order the phrase, “constructed by carrying the tracks of said plaintiff [appellee] company over the tracks of said defendant [appellant] company.” This motion the court overruled. Afterward on the 16th day of October, 1901, the commission-

ers, so appointed, filed in the clerk's office their report, which, omitting that unnecessary to be considered here, was as follows: "The undersigned commissioners having been selected and appointed in accordance with the agreement of said parties embraced in said proceedings, and having received from the clerk of the DeKalb Circuit Court a certified copy of the proceedings in said cause, and having been duly qualified as provided in said proceedings, respectfully report to the court: * * * (2) That, after having fully informed ourselves of all the facts in the controversy between the parties, as stipulated in said agreement of said parties and said order of the special judge of said court, we report that at said proposed crossing of the railroad of said plaintiff with the railroad of said defendants at the place mentioned in said instrument of appropriation, we find that an over-grade crossing at said place, constructed by carrying the tracks of said plaintiff, the Wabash Railroad Company, over the tracks of the said defendant companies, will not be reasonable and practicable. (3) We further find that for the construction of a grade crossing at the place specified in said instrument of appropriation, and for the rights and privileges appropriated by said plaintiff in its said instrument of appropriation, said defendants will be damaged in the sum of \$12,000. Witness our hands this 15th day of October, 1901. W. E. Dauchy, G. W. Vaughn, H. F. Baldwin, Commissioners.

"The commissioners, having made the above report in accordance with the instructions of the court, will further state that they have not considered a plan of crossing which would take the tracks of said plaintiff the Wabash Railroad Company underneath the tracks of said defendant companies, as the instructions of the court precluded such consideration. They are of the opinion, however, that such a means of crossing would be reasonable and practicable. Witness our hands this 15th day of October, 1901. W. E. Dauchy, G. W. Vaughn, H. F. Baldwin, Commissioners."

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Thereupon the court rendered judgment upon the report of the commissioners, establishing a crossing at grade, and reduced to a decree and judgment the provisions of the written agreement of said parties filed herein on September 24, 1901.

Appellants moved that the judgment and decree be modified "so as to provide for the construction at the point of intersection of the plaintiff's railroad with the railroad of the defendant companies of an overhead crossing, constructed by carrying the tracks of the plaintiff's said railroad underneath the tracks of the railroad of the defendants at said point." Before judgment was entered, and after the report of the commissioners was filed, appellants filed a written motion that the court "pronounce and render judgment in the above entitled cause upon the report of the commissioners filed herein, to the effect that an overhead crossing at the point of intersection of the plaintiff's railroad and the railroad of defendants, constructed by carrying the tracks of the plaintiff's railroad underneath the tracks of the railroad of the defendants, is reasonable and practicable, and to adjudge that an over-grade crossing constructed in said manner should be established and constructed at said point." Both motions were overruled by the trial court. Appellee's pleadings are not attacked by counsel for appellants in their brief.

The sole and only question presented by this appeal is as to whether under the agreement of the parties, and under the report of the commissioners the trial court erred in decreeing a crossing at grade. It is the contention of appellants that, with the information before him, which the report of the commissioners contained, it was the duty of the judge, and, under the statute, mandatory, to establish a crossing other than one at grade, and that this be done without regard to the agreement entered into by the parties to this action. It is well enough here to remark that when a railroad, in process of building, commences proceedings

to acquire the right to cross the tracks of an established operating railroad, the crossing over grade or under grade or at grade refers to the crossing by the new road of the old; and the argument of appellants' counsel that an over-grade crossing, by carrying the tracks of the appellee company under the tracks of the appellant companies, is within the meaning of the agreement, is without merit. No such construction can, within reason, be given to the language there employed. Subdivisions five and six of §5153 Burns 1901, confer on railroad companies the right to cross the track and right of way of other railway companies. In this same connection the legislature of 1897 (Acts 1897, p. 237, §5158a Burns 1901) provided: "That where it becomes necessary for the track of one railroad company to cross the track of another railroad company, unless the manner of making such crossings shall be agreed to between such companies, it shall be the duty of the circuit court of the county wherein such crossing is located, or the judge thereof in vacation, to ascertain and define by its decree the mode of such crossing which will inflict the least practicable injury upon the rights of the company owning the road which is intended to be crossed; and if in the judgment of such court it is reasonable and practicable to avoid a grade crossing, it shall by its process prevent a crossing at grade."

A condition precedent to the exercise of the power to appropriate a right of way by a railroad company across the tracks of another railroad company is an effort to agree upon these points, viz., compensation, point of crossing, and manner of crossing. The effort to agree upon these three material points, or a waiver of an agreement, must be directly averred before the company asking the right of way is entitled to the machinery of the courts to enforce its demand. *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 116 Ind. 578. A careful study of the sections of the statute above referred to can not fail to impress one with

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the idea that the intention of the lawmakers was to protect the company owning the road intended to be crossed, so that the least possible interference with its traffic might result from the crossing. This view of the matter is clearly and plainly expressed in §5158a, *supra*, by which the court is directed, "to ascertain and define by its decree the mode of such crossing which will inflict the least practicable injury upon the rights of the company owning the road which is intended to be crossed." To such an extent must the rights of such company be protected, that the court is directed to compel, if practicable, the company seeking the crossing to go under or above the grade, and pay all costs, expenses, and damages. The statute does not make it a question of public policy, but a question of interference with vested rights—the taking of the property of another, and damages occasioned by such taking, caused in cases of this kind, in part, by interrupting and delaying the traffic on the road, etc.

The advisability of reducing the number of, or entirely abolishing, grade crossings, can not be questioned, either from the standpoint of business or public policy; but it was certainly not intended by the statutes now in force, governing this subject, that the determination of the question should be arbitrarily taken from the interested companies, and exercised by the State under its police power for the protection of its citizens. Such view is entirely and absolutely inconsistent with the settled law in cases of this kind—that it is only after all efforts to agree have failed that the aid of the courts can be invoked. The parties in this case had a right to agree as to the manner of making the crossing, and proceed with the work without going into court. Such an agreement would not have been contrary to the statute, nor contrary to public policy; and it can not be said with any show of reason that the commencement of an action to enforce a right given by statute could have the effect of causing the doing of a certain act, which might

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have been legally done theretofore, to become unlawful and against public policy, and its performance by agreement prohibited. We are certain that the parties to this action had a right to agree upon the terms under which their respective rights should be determined. This they did in a plain and unambiguous contract. Neither fraud nor misrepresentation of any kind is alleged, and the record shows upon its face that appellants knew that the contract eliminated an under-grade crossing, and that the order of the court to the commissioners was prepared and approved by the attorneys for all the parties before being entered and signed by the judge. The trial court simply enforced the plain agreement entered into by appellants. They ought not to complain.

The judgment is affirmed.

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[No. 4,344. Filed May 26, 1903.]

RELIGIOUS SOCIETIES.—Expulsion of Member.—Appellate Tribunal.—

Under the provision of the constitution of a religious society, that upon appeal by a member who has been expelled from a local society no person shall sit as a member of the appellate tribunal who sat in judgment at the original trial, members of the local church society, or class, which expelled the member, and who were present at the time of the expulsion, though not voting, were not eligible as members of the appellate tribunal.

From Huntington Circuit Court; *Levi Mock*, Special Judge.

Suit by John M. Hatfield against Joshua W. DeLong and others. From a judgment for defendants, plaintiff appeals. *Reversed.*

J. T. Alexander, M. L. Spencer, W. A. Branyan and H. B. Spencer, for appellant.

J. Q. Cline and J. B. Kenner, for appellees.

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BLACK, J.—In this cause a judgment against the appellant was reversed by the Supreme Court, and the court below was required to overrule a demurrer for want of facts to his complaint. *Hatfield v. DeLong*, 156 Ind. 207, 51 L. R. A. 751, 83 Am. St. 194. The substance of the complaint there held to be sufficient is set out in the opinion rendered on that appeal. It showed that the appellant, a member of a designated church, was summoned for trial, and the trial resulted in his expulsion from the church; that from this judgment he took an appeal to the next quarterly conference, which, under the organic law of the church, was the highest tribunal of the church to which the cause could be taken; that the organic law of the society provided that on appeal the cause should be tried by a tribunal of five, two to be chosen by the accused, two by the quarterly conference, and the fifth by these four; that no person should sit as a member of this appellate tribunal who sat in judgment at the original trial; and that the decision of a majority of the appellate tribunal should be final. It was shown in the complaint that the appellant chose two competent persons to act as members of the appellate tribunal, and that the appellees, members of the quarterly conference, with the fraudulent purpose of depriving appellant of the benefits of his appeal, selected two of their number who sat in judgment at the original trial to act as members of the appellate tribunal, and these two refused to consider the selection of anyone as the fifth member except a certain person in the conspiracy to deprive the appellant of the benefits of an appeal, whose purpose was to join the other two in denying the appellant a fair hearing; that though there were and are many competent persons to choose from, yet the appellees persisted in upholding the unlawful selections so made. The prayer of the complaint was that the two ineligible persons be enjoined from sitting on the appellate tribunal, and that all the appellees be enjoined from acting in the premises until

two competent persons shall have been selected by the quarterly conference. On the return of the cause to the court below, the appellant, by leave of court, filed an additional paragraph of complaint, which contained substantially the same allegations as the original complaint, with some additional averments which need not be set out for the purposes of our decision. There was an answer of general denial, and upon the trial the court rendered a special finding unfavorable to the appellant, on which judgment was rendered against him, his motion for a new trial having been overruled.

On the former appeal, the court, after stating that in a cause such as this, involving only ecclesiastical questions, as offenses against the faith and teachings of the church or infractions of its discipline, the decision of the spiritual court will be accepted as conclusive by the secular courts, said that this rule presupposes the existence of an ecclesiastical tribunal in accordance with the organic law of the church; that the member of a church is to be regarded as having consented that, for all spiritual offenses and infractions of the rules of ecclesiastical discipline, he will abide by the judgment of the highest tribunal organized under the constitution of the church, yet that he can not be compelled to submit his final appeal in such a case to a tribunal organized in defiance of the constitution of the church, but may avoid such submission by appeal to the secular courts; that in such case the secular court assumes that the constitution of the church was intended to be binding upon the church as well as upon its accused member, as in the case of a similar controversy between a voluntary association, such as fraternal orders and social clubs, and a member thereof; and that as an unlawful expulsion from his church would affect the member's standing in the community and accomplish an injury for which there is no adequate remedy at law, injunction is the proper remedy.

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The quarterly conference chose as arbiters to serve on the appellate tribunal Mary Kunce and Frank Cable, appellees. The judgment of expulsion from which the appeal was taken was rendered by the local church society, or class, of which these persons and the appellant were members, at a meeting of the members of the local society held for the purpose of trying the appellant for disobedience to the order of the church. The book of discipline of the church, providing for the taking of an appeal by a member dissatisfied with the decision, provided that in such case, the same person shall not sit in judgment on the same case.

It is contended on behalf of the appellant that the evidence shows that neither of the persons selected by the quarterly conference was eligible as an arbiter, for the reason that they were disqualified by their participation in the trial by the church meeting. If either of the persons was so disqualified, the appellate tribunal was unlawfully constituted. Mary Kunce, as already observed, was a member of the local society, or class, and attended the meeting of the society at which the trial was held and the judgment of expulsion was rendered. She accompanied her husband, who also was a member, and they were present together during all the proceedings of the meeting. They knew that the meeting was to be held for the purpose of such trial, and they went to the meeting for the purpose of being present as members of the church at the trial. The voting upon the question of expulsion was by ballot, the votes of the members being indicated on slips of paper, which were distributed through the congregation. She and her husband each received one of the slips of paper. He voted against the appellant, but she dropped her paper on the floor, and did not vote. She took no active part in the meeting other than being purposely present at the trial as a church member. She purposely abstained from casting a vote. She had the right and the opportunity to vote.

She testified that she did not vote simply because she "didn't want to." Nearly all the other members voted. We think the rule of the book of discipline providing, in relation to such an appeal, that the same person shall not sit in judgment on the same case, contemplates the creation of an appellate body entirely distinct from the trial body. The purpose of the provision manifestly is to secure an impartial consideration by an appellate tribunal composed entirely of persons wholly disinterested and uncommitted and uninfluenced, who are free from the impressions of the earlier proceedings against the accused. Mrs. Kunce was a member of the trial body, present in her capacity of a trier at the trial, and the fact that she abstained from voting upon the final decision of that body, however influenced or actuated to do so, did not make her such a stranger to the trial as the fundamental law of the church set forth in its book of discipline contemplates in its true meaning and purpose. She was not eligible to the office of arbiter.

The other member appointed by the quarterly conference, Frank Cable, was a member of the society and entitled to participate in the trial and to vote upon the finding of the meeting. He was present at the meeting, though he was not there at the opening of the proceedings. He knew the purpose of the meeting and his rights therein as above stated. He was present when the vote of expulsion was taken and for some time before that action of the meeting. He was part of the congregation which held the trial, and he so far took part in the proceedings as to raise his hand in response to a request of the appellant for all persons who did not vote to give such indication thereof. He thus acknowledged his participation as a member of the meeting, and indicated that he regarded himself as one having a right to take part in its proceedings. While his ineligibility is not so fully manifested as that of the other member appointed by the quarterly conference, yet

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he was, we think, excluded from the right to sit as arbiter in review of the trial by the rule of church discipline, construed according to its purpose and legitimate meaning. The evidence showed that there were many other persons eligible as arbiters. These two members appointed by the quarterly conference were no less disqualified for participation in the selection of a fifth arbiter than from participation in the hearing of the appeal, and a fifth arbiter in whose selection they should take part would be without the qualification of an election according to the law of the church.

The finding that the two persons chosen by the quarterly conference were competent and eligible persons to sit as arbiters was not sustained by sufficient evidence.

Judgment reversed; cause remanded for a new trial.

SULLIVAN v. KOHLENBERG.

[No. 4,382. Filed May 26, 1903.]

INTOXICATING LIQUORS.—*Agreement Not to Permit Sale of Liquor on Premises.*—*Subsequent Purchaser.*—*Covenant.*—An agreement of record between the owner of the south half of a lot and the purchaser of the north half not to permit the sale of intoxicating liquors on the south half of the lot, nor to convey the same without inserting a restrictive clause to that effect in the deed, made in consideration of such purchase, and of an agreement to erect a joint building on the lot, though not a covenant running with the land, is enforceable in equity against a subsequent owner under a deed without the restrictive clause. pp. 216-218.

SAME.—*Agreement Not to Permit Sale of Liquor on Premises.*—*Monopoly.*—*Restraint of Trade.*—A contract prohibiting the sale of intoxicating liquors upon a certain lot is not invalid as against public policy in restraint of trade, or tending to create a monopoly. p. 218.

From Wabash Circuit Court; *H. B. Shively*, Judge.

Suit by Christian Kohlenberg against John A. Sullivan. From a judgment for plaintiff, defendant appeals. *Affirmed.*

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Lett & Haisley, for appellant.

R. T. St. John and *W. H. Charles*, for appellee.

ROBINSON, C. J.—Suit by appellee to restrain appellant from selling liquor upon certain described premises.

In April, 1897, appellee and one John Weigel entered into a written agreement which recited that Weigel then owned in fee the south half of a certain lot and that one Overman owned the north half; that Weigel, being desirous to have some one purchase the north half and join him in the erection of a joint brick block on the lot, agreed with and promised Kohlenberg that, in consideration of his purchasing from Overman the north half, he (Weigel) would never sell or permit sold intoxicating liquors on the south half of the lot, and "that he will not sell or transfer the south half to any person or persons without inserting in the deed of conveyance a clause prohibiting the sale of intoxicating liquors, and that, if said clause shall be violated, the property shall revert to the grantor; and the second party [appellee] agrees to purchase the said north half in consideration of said promise of said first party, and it is hereby agreed between said parties that as soon as practicable they will erect a brick block on said lot." The agreement was recorded in the miscellaneous record of the recorder's office of Grant county on the same day. Pursuant to this agreement appellee avers that he purchased the north half of the lot, and he and Weigel jointly erected a two-story brick building, with two business rooms and a joint stairway between them leading to the second story. Weigel afterwards sold the south half of the lot to appellant, who took the conveyance with knowledge of the agreement, without inserting in the deed a clause prohibiting the sale of liquors. Appellee sues to restrain appellant from locating a saloon and "road house" in the part of the building standing on the south half of the lot, averring certain special injury to his property.

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The agreement in question is not a covenant which runs with the land. There was no privity of estate between the parties to the agreement, the covenantee had no interest in the land upon which the covenant imposed a burden, no interest or estate was granted, and the act which it was agreed should be done did not concern any interest or estate granted or conveyed. *Indianapolis Water Co. v. Nulte*, 126 Ind. 373; *Conduitt v. Ross*, 102 Ind. 166; *Wells v. Benton*, 108 Ind. 585.

But the contract in question is a restrictive agreement as to the use of property, which may be enforced upon equitable grounds in favor of the lot designed to be benefited by the restriction. And it may be enforced against any owner of the lot, subject to the burden of the restriction, who took it with notice. When Weigel entered into the agreement he attached to that part of the lot owned by him an equity in favor of the appellee as soon as he became the owner of the other part of the lot. Appellee purchased the lot, relying upon the agreement made by Weigel, which was a valid agreement and certainly binding upon Weigel. Equity would have restrained him from selling liquor upon the lot, and appellant, having purchased the lot with notice of the equity, does not stand in any different situation from the party from whom he purchased. As the agreement was intended to affect the use of the property in the hands of a grantor by inserting in the deed a restriction upon its use, it can not be said to be a purely personal contract, but goes with the land into the hands of a purchaser with notice of the agreement. The complaint states sufficient facts to entitle appellee to injunctive relief. See *Lewis v. Gollner*, 129 N. Y. 227, 29 N. E. 81, 26 Am. St. 516; *Watrous v. Allen*, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363; *Hano v. Biglow*, 155 Mass. 341, 29 N. E. 628; *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 Atl. 386, 1077, 36 L. R. A. 393;

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Coughlin v. Barker, 46 Mo. App. 54; *Hayes v. Waverly, etc., R. Co.*, 51 N. J. Eq. 345, 27 Atl. 648; *Ferris v. American Brewing Co.*, 155 Ind. 539; *Ladd v. City of Boston*, 151 Mass. 585, 24 N. E. 858, 21 Am. St. 481 and note.

There was no error in sustaining a demurrer to appellant's eighth paragraph of answer, which pleaded facts intending to show that the contract was invalid, as against public policy, in that its purpose was to create a monopoly in that vicinity in appellee. It can not be said that a contract prohibiting one person and his assigns from selling liquor upon a single lot would confer the power to obtain a monopoly in the business. The scope of the facts pleaded in the answer can not be said to create a monopoly. Nor can it be said that they show an unreasonable restraint upon trade. The contract contained no general restraint upon Weigel's right to engage in the liquor business. *O'Neal v. Hines*, 145 Ind. 32; *Eisel v. Hayes*, 141 Ind. 41.

Judgment affirmed.

CITY OF CONNERSVILLE v. SNIDER.

[No. 4,889. Filed May 26, 1903.]

MUNICIPAL CORPORATIONS.—Defective Bridge.—A city is liable in damages for failure to keep its bridges in a reasonably safe condition. *p. 219.*

SAME.—Defective Bridge.—Notice.—A city is chargeable with notice of a defect in a bridge in a populous part of the city consisting of a hole two feet long and six inches wide which had existed for three or four months. *pp. 219, 220.*

DAMAGES.—Pleading.—Evidence.—An averment in a complaint in an action for personal injuries that "the muscles of plaintiff's legs, arms, sides, back, abdomen, and bowels were strained and bruised to an extent that plaintiff suffered great pain of body and anguish of mind" was sufficient to admit evidence that a hernia with which plaintiff was suffering at the time of the injury was aggravated by the injuries received. *p. 220.*

From Fayette Circuit Court; *F. S. Swift*, Judge.

City of Connersville v. Snider.

Action by Edward Snider against the city of Connersville. From a judgment for plaintiff, defendant appeals. *Affirmed.*

G. C. Florea and *L. L. Broaddus*, for appellant.

R. N. Elliott, F. I. Barrows, Reuben Conner and *Lon Conner*, for appellee.

ROBINSON, C. J.—Appellee recovered a judgment for damages for personal injuries from an alleged defective bridge.

It is argued at some length that, in the absence of some statute, cities are not liable for negligence in omitting to keep bridges in repair, as they are subdivisions of the State for local government exercising powers delegated by the State, and burdened with no greater liability for their non-exercise than the State. Whatever may be the rule in other jurisdictions, the doctrine has long been recognized in this State that cities, having exclusive power over streets, highways, and bridges within the city, and having the power of taxation for general purposes, the duty devolves upon them to keep the streets in a reasonably safe condition for travel, and for failure to do so they must respond in damages to a person injured by their neglect. We think it unnecessary to cite the long list of authorities recognizing this doctrine, beginning with *Higert v. City of Greencastle*, 43 Ind. 574, and *Grove v. City of Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262. Not only has this doctrine been recognized, but in *Town of Boswell v. Wakley*, 149 Ind. 64, the court expressly declined to overrule the long line of decisions holding municipalities liable, and approved the distinction drawn in *Board, etc., v. Allman*, 142 Ind. 573, 39 L. R. A. 58, between the powers and liabilities of municipalities in this respect and the powers and liabilities of counties.

It does not appear that the municipality or its officials had any actual notice of the defect in the bridge, but it

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appears that the bridge was in a populous part of the city, and that the defect consisted of a hole two to three feet long and six inches wide, which had existed for three or four months. Under such circumstances the city is chargeable with notice.

An averment in the complaint that "the muscles of plaintiff's legs, arms, sides, back, abdomen, and bowels were strained and bruised to an extent that the plaintiff suffered great pain of body and anguish of mind," etc., was sufficient to admit evidence that a hernia with which appellee was suffering at the time was aggravated by the injuries received. The evidence tended to show that his existing physical condition was injuriously affected. Evidence tending to show the actual damage suffered by appellee from appellant's negligence was competent.

There is nothing in the record from which we can say that the damages allowed by the jury were excessive. There is evidence to authorize a verdict for the amount given. As we can not say from the whole record that the jury abused the discretion vested in them, and as there is evidence to authorize the verdict, we can not disturb it.

Judgment affirmed.

BORKENSTEIN v. SCHRACK.

[No. 4,408. Filed May 26, 1903.]

DAMAGES.—Assault and Battery.—Punitive Damages.—Punitive damages can not be awarded for an assault and battery, since defendant is also subject to a criminal prosecution. *p. 221.*

APPEAL AND ERROR.—Harmless Error.—Erroneous Instruction.—A cause will be reversed because of an erroneous instruction given where it does not clearly and affirmatively appear from the record that the verdict is right upon the evidence. *pp. 221, 222.*

From the Superior Court of Allen County; *J. H. Aiken*, Judge.

Borkenstein v. Schrack.

Action by Joseph Schrack against Bernard Borkenstein. From a judgment for plaintiff, defendant appeals. *Reversed.*

Wilmer Leonard and Elmer Leonard, for appellant.
Henry Colerick, for appellee.

ROBINSON, C. J.—Appellee recovered a judgment for damages for an assault and battery.

In some of the instructions to the jury they were told that they might award punitive damages. These instructions were erroneous. It is a well settled rule that for a wrong, the commission of which subjects the wrongdoer to both a criminal prosecution and a civil action, punitive damages can not be assessed. *Tabor v. Hutson*, 3 Ind. 322, 61 Am. Dec. 96; *Johnson v. Vuthrick*, 7 Ind. 137; *Struble v. Noddrift*, 11 Ind. 64; *Nay v. Byers*, 13 Ind. 412; *Butler v. Mercer*, 14 Ind. 479; *Nossaman v. Rickert*, 18 Ind. 350; *Humphries v. Johnson*, 20 Ind. 190; *Meyer v. Bohlfig*, 44 Ind. 238; *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34; *Stewart v. Maddox*, 63 Ind. 51; *State, ex rel., v. Sterens*, 103 Ind. 55, 53 Am. Rep. 482; *Wabash Printing, etc., Co. v. Crumrine*, 123 Ind. 89; *Louisville etc., R. Co. v. Goben*, 15 Ind. App. 123; *Tracy v. Hackett*, 19 Ind. App. 133, 65 Am. St. 398.

Appellee concedes that these instructions were erroneous, but insists that it affirmatively appears from the evidence that they were harmless. Upon a careful consideration of all the evidence we can not say, although the amount of damages awarded by the jury is not large, that it affirmatively appears that these erroneous instructions were harmless. The jury were the exclusive judges of the credibility of the witnesses and of the weight of the evidence. These erroneous instructions are presumed to have had an influence on the jury, until the contrary is shown. It is true that under §659 of the code (§670 Burns 1901) it has many times been held that where the record affirma-

tively shows that the verdict is right upon the evidence, the judgment will not be reversed because the court has erred in the instructions given to the jury. But upon the whole record we are not able to say that it so clearly and affirmatively appears that the verdict is right upon the evidence as to render the error in giving these instructions harmless. See *City of Lafayette v. Ashby*, 8 Ind. App. 214, and cases cited.

A new trial should have been granted. Judgment reversed.

RICHMOND NATURAL GAS COMPANY v. ENTERPRISE NATURAL GAS COMPANY ET AL.

[No. 4,616. Filed March 19, 1903. Rehearing denied May 26, 1903.]

NATURAL GAS.—*Transportation by Artificial Means.*—*Injunction.*—The use of pumps or compressors in the transportation of natural gas is not prohibited by §7507 Burns 1901, which provides that natural gas “shall not be transported through pipes at a pressure exceeding 800 pounds per square inch, nor otherwise than the natural pressure of the gas flowing from the wells,” and an adjoining landowner tapping a common reservoir is not entitled to an injunction to restrain defendant from transporting gas by merely showing the use of the pumps, nor by showing that he is injured because the gas is being wastefully diminished by the use of the pumps. pp. 229–234.

SAME.—*Transportation by Artificial Means.*—*Injunction.*—*Increase of Flow from Wells.*—To entitle one interested in a common reservoir of natural gas to an injunction, under §§7507–7509 Burns 1901, restraining another from transporting natural gas therefrom by artificial means, it must be shown that the artificial means so used will increase the flow of gas from the wells. pp. 230, 231.

SAME.—*Transportation by Artificial Means.*—*Injunction.*—*Special Finding.*—*Appeal and Error.*—Where in a suit to enjoin the transportation of natural gas by artificial means the court found as an ultimate fact that the use of the pumps has the effect of increasing the general flow of gas from the wells, and also found the primary facts from which it appears that the use of the pumps would not increase the amount of gas coming from the wells, through the natural laws of flowage, the ultimate fact so found will be disregarded on appeal. pp. 234, 235.

Richmond Nat. Gas Co. v. Enterprise Nat. Gas Co.

From the Superior Court of Madison County; *H. C. Ryan*, Judge.

Suit by the Enterprise Natural Gas Company and others against the Richmond Natural Gas Company. From a judgment for plaintiffs, defendant appeals. *Reversed*.

R. A. Jackson, H. C. Starr, J. F. Robbins, J. C. Blackledge, C. C. Shirley and Conrad Wolf, for appellant.

E. H. Bundy, J. M. Morris, M. E. Forkner and G. D. Forkner, for appellees.

ROBINSON, J.—Suit by appellees for an injunction to prevent the use by appellant of compressors and appliances to increase the natural flow of gas from wells, and to prevent the transportation of gas through pipe-lines otherwise than by the natural pressure from such wells.

The complaint in this case is not sufficient as a complaint to enjoin the maintaining of an excessive pressure in the lines, but giving it the theory that it seeks to prevent the use of pumps or other artificial means for the purpose of increasing the natural flow of gas from the wells, we think it states a cause of action.

The questions presented arise out of the conclusions of law upon the following facts specially found: All the parties to this suit have an interest in common in the undeveloped gas which is within a common reservoir underlying certain described territory, and each owns leases and gas-wells in this territory which are producing gas which is used in various ways by the respective parties; that the salt water beneath and around this reservoir is held back by the pressure of the gas in the rock, and any reduction of the gas pressure tends to admit the salt water into the rock; and whenever the gas pressure is reduced below the pressure of the salt water it at once enters the rock, and destroys the territory to the extent that it is admitted; that the reduction of the gas pressure in the rock tends to the irreparable injury and final destruction of the gas field and

common reservoir. Appellant is a corporation engaged in furnishing natural gas to the citizens of Richmond, about thirty-eight miles from this gas territory, and has a number of pumps and compressors which it is threatening to use for the purpose of forcing gas through its pipe-lines; that at and prior to the bringing of this suit it had procured leases on a large number of tracts of land within this territory, and had drilled forty-six gas-wells, and connected them by pipe-lines with its pumping-station, and laid from the station to the city of Richmond an eight inch pipe-line.

The ninth, tenth, eleventh, and twelfth findings are as follows: “(9) That said pumps and compressors are and constitute devices for pumping gas, and have the effect of stimulating and increasing the general flow of natural gas from the wells, and of increasing and maintaining the flow of natural gas through the pipes used for conveying and transporting the same; that at the bringing of this suit the defendant was threatening and intending to use and operate said pumps and pumping station for the object and purpose aforesaid; that the use of said pumps will give to the defendant an undue proportion of said gas within said reservoir, above what would naturally flow through its pipes and mains by the natural pressure of gas, and will thereby take from all others, and especially the plaintiffs, having an interest in said field, a large portion of said gas, which would naturally flow to them if said reservoir and field was left unaffected by artificial appliances; that the use of said pumps will unduly reduce the back-pressure of the gas in said field and reservoir, and thereby induce salt water to enter the same, to the great and irreparable injury of said common reservoir, and of the rights and property of the plaintiffs therein. (10) That the defendant could not carry gas from its wells in Henry county to its patrons in Richmond by the use of its pumps in greater quantity than would be conveyed by the natural or well pressure, without

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increasing the natural flow of gas in its mains. (11) That it is the intention of the defendant, and was when this suit was begun, to use its said pumps and compressors to transport more gas through its pipe-lines from its wells in Henry county to its patrons at the city of Richmond, in Wayne county, than could or would flow naturally through its lines of pipe by well pressure, and without the aid or assistance of said pumps or compressors. (12) That the use and operation of said pumps and compressors will take more gas from the intake of the said pumps, or the side between said wells and said pumps, than would flow into and through the said pumps by reason of the natural well pressure, and would stimulate the flow of gas into said pumps and into defendants' gas-mains."

It is further found that any gas drawn from the lands of either of the parties to this suit diminishes to that extent the common supply contained in the reservoir; that when this suit was brought the parties had a large number of wells from which they were procuring large quantities of natural gas, and that appellant was producing from its wells about 2,000,000 cubic feet of gas per day, to the city of Richmond, which was being transported through a system of pipes, under the natural pressure of the gas, without the use of artificial means; that, in order to supply its customers in Richmond, it is necessary for appellant to deliver from 2,000,000 to 2,500,000 cubic feet of gas per day; that the natural gas pressure was sufficient to force through appellants' pipe-line a sufficient supply of gas to the city of Richmond in moderate weather, but was insufficient in extremely cold weather, and the natural pressure was gradually diminishing, and will continue to diminish as gas is consumed from the reservoir, until the gas pressure is not sufficient to carry an adequate supply of gas for the use of appellant's consumers without the aid of artificial devices; that the natural gas pressure will con-

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tinue to decline because of the consumption of gas until in the near future only a small part of the gas required for appellant's customers can be delivered without the aid of such artificial devices; that it is the intention of appellant to operate these pumps and compressors whenever the weather is such that an adequate supply of gas can not be delivered to its customers by the natural pressure of gas through its pipes, which will hereafter be a large portion of the year, on account of the diminishing natural pressure.

The seventeenth finding is as follows: "That said natural gas pumps or compressors are so constructed and geared as that they may be run either at a high or low speed, the amount of gas which the same will handle being regulated by the speed at which the said compressors are so operated; that said compressors can be so operated as to take all or any part of the gas supplied to the same, provided the quantity or volume of gas so supplied to said pumps or compressors does not exceed the maximum capacity of the same, but that whenever the quantity of gas supplied to said pumps or compressors exceeds the maximum capacity of said pumps, or exceeds the volume of gas being carried forward by said pumps at any given time, the effect of such excessive supply is partially to dam or back up said gas in the pipes supplying said compressors, so as to retard the flow thereof in the said pipes, and cause what is known as 'back-pressure' in said supply pipes, and in the wells connected therewith."

It is further found that when this case was tried the combined natural flow of gas from appellant's wells was in excess of 29,000,000 cubic feet per day; that all of the wells are connected with one main line to the intake of the pumps and compressors; that the wells are so connected that the gas in the pipe-lines, with their entire natural flow, can be, and is, carried to the pumps by the natural pressure of the gas, except as the same is retarded by the friction of

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the pipes, but that this friction is such that, while more than 29,000,000 cubic feet of gas per day will naturally flow from the wells to the surface of the ground, between 16,000,000 and 17,000,000 cubic feet of gas, only, will be carried through the system of pipes to the point where the pumps are located by the natural pressure of the gas flowing from the wells; that the friction of the pipes is so great that, with the entire output of the wells flowing into the pipes, only about 2,000,000 cubic feet will be delivered at Richmond, without the aid of artificial devices; that there will naturally flow from appellant's wells through its pipeline to the pumps about three-fifths of the entire natural flow from the wells at the surface of the ground, the flow being retarded by the friction of the pipes so that the other two-fifths is held back in the wells, and that only about one-fifteenth of the natural flow will be carried to Richmond without the aid of artificial devices.

The nineteenth finding is as follows: "That the natural pressure of gas when flowing from the mouth of defendant's wells, unretarded by any valves or other artificial devices, does not exceed two or three pounds per square inch in the largest of said wells, grading downward to less than one pound to the square inch in the smallest of said wells; but that said wells, all being connected with the same line of pipe leading into said gas compressors, maintain practically an equal amount of back-pressure so long as the quantity permitted to flow into said pipes for transportation is less than the quantity carried to said pumps on the intake side thereof, by said pipe-line leading to the same; the qualities, character, and expansive power of natural gas being such as to equalize the pressure at all points in any given system of wells, pipes, and reservoirs connected with each other, except as said pressure may vary on account of the different degrees of friction at various points in said system, so that whenever any back-pressure is maintained in defendant's said pipe-line, supplying

its said pumps or compressors, on the intake side thereof, a slightly greater back-pressure will be maintained in each of the wells connected with said pipes than in said pipe on the intake side of the pumping-station, varying in each case as the distance is greater or less from each of said wells to said pumping-station; the back-pressure increasing with the distance to each of the said wells, and corresponding with the loss due to friction in each case."

That it is the intention of appellant to maintain at all times a sufficient number of wells to produce naturally a volume of gas largely in excess of the amount required for its consumers, and take only a portion of the natural flow at any given time, and to maintain in each of the wells and in the lines a considerable back-pressure, and that it is appellant's intention to maintain a sufficient number of wells producing naturally a sufficient volume of gas to deliver naturally to the pumps a much larger quantity of gas than is necessary to supply its customers, in order that it may at all times maintain on the intake side of the pumps a considerable back-pressure, and thereby retard and confine in the wells a portion of the natural flow of each, so as to prevent the entrance of salt water therein; that at no time has it been or is it appellant's intention to permit the entire natural flow from its wells to be taken by means of pumps or compressors; that it is necessary for the preservation of appellant's own property that a portion of the natural flow be held back, and appellant has intended at all times to hold back a portion of the natural flow, by creating and maintaining back-pressure on the intake side of its pumps, and permit only a portion of the combined natural flow of each well to flow into its pumping-station, and be transported therefrom.

It is further found that the use of pumps will have the effect of increasing the flow from the point where the pumps are located to the city of Richmond, beyond what would naturally flow to that point, by increasing the pres-

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sure of gas, and releasing the same on the outflow side of the pumps at such increased pressure, and, as a consequence thereof, increasing the velocity at which the gas would flow from the pumps to the point of consumption; that, by the use of the pumps, appellant would get a larger per cent. and proportion of gas from the common reservoir than it could or would get without the use of pumps and by the natural rock pressure.

The first section of the act of March 4, 1891 (Acts 1891, p. 89, §7507 Burns 1901) provides that natural gas "shall not be transported through pipes at a pressure exceeding 300 pounds per square inch, nor otherwise than by the natural pressure of the gas flowing from the wells." Section two (§7508) provides that it shall be unlawful "to use any device for pumping or any other artificial process or appliance for the purpose, or that shall have the effect of increasing the natural flow of natural gas from any well, or of increasing or maintaining the flow of natural gas through the pipes used for conveying and transporting the same." The third section (§7509) provides a penalty, and that parties "may be enjoined from conveying and transporting natural gas through pipes otherwise than in this act provided."

We can not agree with counsel for appellees that the legislature, by this statute, has conclusively determined that the effect of the use of pumps is necessarily injurious, and has absolutely prohibited their use. Appellees' case is not made out by merely showing the use of pumps for the purpose of transportation. The use of pumps or compressors for such purpose is not *ipso facto* unlawful. The constitutional validity of the statute is not questioned. Appellant's position is that the statute can not be so construed as to permit transportation at a natural pressure of 300 pounds per square inch, and yet deny the right to transport by artificial means at a pressure much lower than 300 pounds per square inch. This position is sustained by the

Supreme Court in *Jamieson v. Indiana Nat. Gas, etc., Co.*, 128 Ind. 555, 12 L. R. A. 652. That case holds that this statute was enacted for the purpose of protecting persons and property from the inflammable and explosive character of gas in transit, and fixing the maximum pressure at 300 pounds per square inch, at which it may be transported, whether by the natural or by artificial pressure.

And in *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 156 Ind. 679, appellants unsuccessfully sought to enjoin appellees from transporting gas from their wells at a pressure in excess of the natural rock pressure, and by means other than the natural pressure. The court in that case said: "The provisions of the section in question in this case can be enforced at the suit of a private person only where such person can show that he sustains, or is likely to sustain, some special injury, or that he or his property is exposed to some particular damage, which this statute was intended to prevent. The appellants present no such case. It is not averred that their property is endangered by the alleged wrongful acts of the appellee, nor does it appear that they are likely to sustain any special injury peculiar to themselves in consequence of the violation of the act by the appellee." See, also, *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 155 Ind. 545; *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 155 Ind. 566.

It is manifest from the above holdings that appellees would not be entitled to injunctive relief by merely showing the fact of the use of pumps for the purpose of transporting gas. Nor would they be entitled to such relief by showing that they are injured because the gas is being wastefully diminished by the use of the pumps. "The act does not directly, nor indirectly, attempt to prevent waste of the gas." *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 156 Ind. 679. We think it is perfectly clear that the complaint in this case is not sufficient to

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charge against appellant improper methods of transportation.

However, injunction will lie to prevent the use of devices for pumping, and employing artificial processes or appliances for the purpose or having the effect of increasing the natural flow of gas from the wells. *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 155 Ind. 461, 50 L. R. A. 768.

It is no longer an open question in this State that natural gas, when reduced to possession, becomes private property, and is a commercial commodity, which the owner may dispose of in whatever manner he may consider most advantageous. *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 155 Ind. 545; *State, ex rel., v. Indiana, etc., Mining Co.*, 120 Ind. 575, 6 L. R. A. 579; *Jamieson v. Indiana Nat. Gas, etc., Co.*, *supra*; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. 576. Whatever gas, through natural causes, rises to the surface of the ground through the wells of an individual owner, and is carried by such natural forces into tanks, pipe-lines, or other receptacles of such owner, becomes absolutely his property. The only limitation upon such owner taking the gas is the manner in which he shall take it from the wells. As is said in *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 155 Ind. 461, 50 L. R. A. 768, "Natural gas in the ground is so far the subject of property rights in the owners of the superincumbent lands, that while each of them has the right to bore or mine for it on his own land, and to use such portion of it as when left to the natural laws of flowage may rise in the wells of such owner and into his pipes, no one of the owners of such lands has the right, without the consent of all the other owners, to induce an unnatural flow into, or through, his own wells, or to do any act with reference to the common reservoir, and body of gas therein, injurious to, or calculated to destroy it." And it is held that the statute in question does not

create any new remedy in favor of an owner in common of undeveloped gas, who shows that he will sustain some special injury by reason of the act of another of the common owners which might work to the injury or destruction of the common source from which the gas is drawn. An action would lie in such case independently of the statute. *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 156 Ind. 679; *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 155 Ind. 461, 50 L. R. A. 768.

The sole question here is whether the special findings show that the use of the pumps and compressors will work such injury to appellees, by increasing the flow of gas from the wells, as entitles them to injunctive relief. It is a property of gas, that, while easily compressed, it is always ready to expand and occupy more space. This expansive force or tension imparted to it by some pressure brings it through the wells to the surface and into pipes or other receptacles. The quantity of gas that this expansive force or tension, overcoming the atmospheric pressure, will bring to the surface, and into the pipes or receptacles, is the natural flow of the wells. The natural import of the term "natural flow," as used in the statute, necessarily means the entire volume of gas that will issue from the mouth of a well when retarded only by the atmospheric pressure. If certain wells will bring into a receptacle at the surface 1,000,000 feet of gas per day, that is their natural flow. Suppose a valve in this receptacle permits one-half this volume to pass into pipes to consumers. Opening an additional valve, and permitting one-half the balance to pass from the receptacle to other consumers, does not increase the natural flow, in the sense in which the term is used in this statute. With the additional valve a greater portion of the natural output of the wells is taken, but the natural flow of the wells has not been increased. And, as illustrated in appellant's brief, suppose pumps are attached to a well naturally producing 1,000 barrels of water per

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day, for the purpose of forcing 500 barrels daily to a higher altitude, in order that it may be utilized. Although the water flowed from the well into a main to which the pumps were attached, and the total output put under control, it could not be claimed that the natural flow of the well had been increased by the use of the pumps in carrying half the natural flow to a place for convenient distribution.

It must be conceded that appellant has the right to use all the gas that naturally comes through its wells to the surface of the ground. When we speak of this as "the natural flow of the wells," we necessarily mean the total output of the wells from natural causes. The term "natural flow," as used in the statute, can be given no other reasonable meaning. An artesian well from which flows 1,000 barrels of water daily has a natural flow of 1,000 barrels daily. And so it is with gas-wells. Increasing this natural flow of gas or this total output of the wells from natural causes is the thing that is prohibited, and so long as the appliances take less than this natural flow, as thus understood, it can not be said that they have increased the natural flow. Upon the facts found all the gas that goes into the pumps on the intake side goes in by reason of its own expansive force or tension. This expansive force or tension must necessarily exist so long as back-pressure is maintained at the pumps. The court finds that this back-pressure was to be maintained at all times by appellant in the operation of its pumps and compressors, and that at no time has it been or is it appellant's intention to permit the entire natural flow from its wells to be taken by the pumps. Unless the pumps were so operated as entirely to remove this back-pressure and create suction in the wells, it could not be said that they would increase the natural flow or natural output of the wells. From the facts found the only effect of the use of the pumps is to

decrease the force of this back-pressure, but this the statute does not prohibit.

It is true that through the use of the pumps a greater portion of the natural flow or total natural output of the wells will be taken than would be taken without their use, and that the back-pressure in the wells will be correspondingly decreased. But the statute does not require that only a certain portion of the gas coming naturally from a well can be used, and that a certain portion shall be held back. Nor does the statute require that a certain amount of back-pressure, or that any back-pressure, shall be maintained. It can not be denied that appellant might lawfully dispose of the total product of its wells to consumers near the wells, and the total natural flow be consumed by them, without maintaining any back-pressure in the wells.

We find nothing in this statute which requires us to say that, although the 100,000 feet of gas produced naturally by A's well is A's property, and a like amount so produced by B's well in the same vicinity is B's property, that A may use this total output in his factory at the mouth of his well, and B must be denied the use of the output of his well in his factory ten miles distant, because the natural pressure is insufficient to carry it that distance. While the court found, as an ultimate fact, that the use of the pumps has the effect of increasing the general flow of gas from the wells, it also found the primary facts from which it appears that the use of the pumps would not increase the amount of gas coming from the wells through the natural laws of flowage. In such case the ultimate fact will be disregarded on appeal. "Where the primary facts," said the court in *Smith v. Wells Mfg. Co.*, 148 Ind. 333, 342, "are stated and they lead to but one conclusion, the statement of the ultimate fact will be disregarded, since a statement of the ultimate fact is required only where, from the primary facts, either of two conclusions may reasonably be drawn. *Cincinnati, etc., R. Co. v. Grames*, 136 Ind. 39; *Smith*

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v. *Wabash R. Co.*, 141 Ind. 92; *Board, etc.*, v. *Bonebrake*, 146 Ind. 311."

Judgment reversed, with instructions to state a conclusion of law in appellant's favor.

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[No. 4,880. Filed May 26, 1903.]

VENDOR AND PURCHASER.—Description of Real Estate.—Specific Performance.—A contract for the sale of real estate described the land as "Lot 30, Douglas Park," and the contract was dated at Indianapolis, Indiana. *Held*, that the description was sufficient to support a suit for specific performance, it being presumed, for the purpose of determining the sufficiency of the complaint, that the lot was located where the agreement was dated. pp. 237-241.

SAME.—Contracts.—Time Not Essence of Contract.—In a contract for the sale of real estate acknowledging the receipt of \$100, and providing that \$50 should be paid on or before April 1, 1899, \$50 on or before May 1, 1899, \$100 on or before June 1, 1899, and \$100 on or before July 1, 1899, and when the vendee shall have paid all of the above sums the vendor shall execute a warranty deed, time was not of the essence of the contract so as to defeat a suit for specific performance because \$30 of the purchase money remained unpaid August 8, 1899. p. 241.

SAME.—Specific Performance.—Tender of Purchase Money.—In a suit for the specific performance of a contract to convey real estate upon the payment of the specified purchase money, a tender of the balance of the purchase money before bringing suit on condition that the deed be executed was sufficient, and not prejudicial to defendant. p. 242.

SAME.—Contract Executed at Different Times.—A contract for the sale of real estate is not unenforceable because executed in two parts at different times, where it relates to the same transaction and appears to be intended as one instrument. pp. 242, 243.

SAME.—Specific Performance of Contract.—Alternative Judgment.—Damages.—In a suit for the specific performance of a contract to convey real estate in which defendant's wife was not a party, a judgment requiring defendant to execute and deliver to plaintiff a warranty deed, signed by himself and wife, and, upon his failure to comply with such order, to pay plaintiff damages equal to the amount of purchase money paid and interest thereon was proper. pp. 243, 244.

SAME.—Specific Performance.—Demand.—Where a contract for the sale of real estate provided that when certain payments of pur-

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chase money were made the vendor should execute a warranty deed, no demand for a deed was necessary, and when the purchaser tendered the last payment it was the duty of the vendor to execute the proper deed without any demand upon him.
pp. 244, 245.

From Marion Circuit Court; *H. C. Allen*, Judge.

Suit by Lillian L. Masters against James D. Maris for the specific performance of a contract to convey real estate. From a judgment for plaintiff, defendant appeals. *Affirmed.*

R. O. Hawkins and *H. E. Smith*, for appellant.

H. L. Hutson, for appellee.

COMSTOCK, P. J.—The complaint alleges that on March 15, 1899, the plaintiff and defendant entered into an agreement whereby plaintiff purchased from defendant a certain piece of realty therein described; that, by the terms of purchase, plaintiff was to pay therefor \$900, as follows: (1) Four hundred dollars, in payments, between March 15, 1899, and July 1, 1899; and (2) by the assumption of a certain mortgage thereon. It is alleged that plaintiff agreed with defendant that, when said sum of \$400 was paid, he would convey said realty to plaintiff by good and sufficient warranty deed, subject only to said mortgage. It is then charged that defendant reduced said contract to writing, and delivered the same to plaintiff, properly signed by him, and a copy of the so-called written agreement is filed with the complaint and made a part thereof. It is further alleged that she complied with all the terms of the agreement on her part, and that she paid the money in payments, except \$30; that on August 8, 1899, she tendered the sum of \$30, with twenty-five cents interest, to the defendant, and demanded of him a good and sufficient deed of general warranty, and that the defendant failed and refused to convey the said realty to her according to the terms of the agreement, and that she now brings said money into court for the use and benefit of defendant, and prays for a decree requiring de-

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fendant to comply with his agreement; that he be required to execute to her a good and sufficient deed of general warranty for said realty, and, failing, that he be held in contempt of court, and that she have damages for such sum as the court shall determine to be good and equitable. In brief, the action is one for specific performance of an alleged written contract to convey realty. Appellant's demurrer for want of facts was overruled. He then filed an answer in five paragraphs, the first being a general denial. The cause was put at issue, and a trial by the court resulted in a judgment and decree: (a) That plaintiff pay the clerk of the court, for the defendant, \$33.15, within one day, to be paid to defendant when he has fully complied with this order; (b) that defendant Maris, within thirty days from this date, execute and deliver to plaintiff a good and sufficient warranty deed, signed by said defendant James D. Maris and his wife, conveying the realty thereafter described, subject only to the mortgage for \$500, described, with interest; (c) that if defendant fails or refuses to deliver a deed, as above described, plaintiff recover damages in the sum of \$400, and that she have return of the money paid by her into court; (d) that plaintiff recover costs.

The errors assigned are: (1) The overruling of the demurrer to the complaint; (2) the sustaining of the demurrer to the second paragraph of answer; (3) the overruling of the motion to correct and modify the judgment and decree; and (4) the overruling of the motion for a new trial.

The first objection urged to the complaint is that the contract is void for uncertainty of description. It is urged that the averments of the complaint are broader than the agreement, and "when the allegations of a pleading vary from the provisions of the instrument upon which it is founded, the provisions of such instrument control, and such allegations will be disregarded." Appellee admits that, where the variance claimed exists, the exhibit will

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control, but insists that the variance claimed does not exist. *Harrison Bldg., etc., Co. v. Lackey*, 149 Ind. 10. The statute of frauds (§6629 Burns 1901, §4904 Horner 1901) provides: "No action shall be brought in any of the following cases: * * * (4) Upon any contract for the sale of lands * * * unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized; excepting, however, leases not exceeding the term of three years."

An agreement for the sale of lands which contains no sufficient description of the property is void for uncertainty, and can not be enforced. The complaint alleges a contract between the plaintiff and the defendant for the purchase "of the following described real estate in Marion county, Indiana, to wit: Lot number thirty, Douglas Park, an addition to the city of Indianapolis." The words of description in the exhibit are "Lot 30, Douglas Park," at the end of the receipt, before the name of J. D. Maris. The agreement which is made a part of the complaint is in the following language: "Indianapolis, Ind., March 15, 1899. M..... To J. D. Maris, Dr., Builder. Plans drawn. Estimates furnished. All kinds of repair work. 1339 North Alabama Street.

"Received of L. L. Masters, \$100 on account of lot 30, Douglas Park. J. D. Maris.

"Fifty dollars to be paid to J. D. Maris on or before April 1, 1899, \$50 on or before May 1, 1899, \$100 on or before June 1, 1899, and \$100 on or before July 1, 1899. When the said L. L. Masters shall have paid all the above sums to J. D. Maris, then the said James D. Maris, is to make said L. L. Masters a warranty deed for the same. Said L. L. Masters to assume one \$500 mortgage note given to the trustees of Philoxenia lodge, No. 44, due on or before

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March 14, 1900, with interest at six per cent. per annum.
[Signed] J. D. Maris."

In determining whether the description is sufficiently certain, we must bear in mind that the office of a description in a deed is not to identify the land, but it is to furnish the means of identification. The part of the deed describing the premises conveyed is to be construed with the utmost liberality. *Rucker v. Steelman*, 73 Ind. 396, and cases cited: *Singer v. Scheible*, 109 Ind. 575, and cases cited at page 583; *Frick v. Godare*, 144 Ind. 170.

The writing bears date at Indianapolis, Indiana. This may indicate that the lot was situate in said city. In *Mead v. Parker*, 115 Mass. 414, it was held to be "an inference of fact, though not conclusive," that the land is situate in a certain place, owing to the fact that the written contract to convey is dated at that place. *Riley v. Hodgkins*, 57 N. J. Eq. 278, 41 Atl. 1099, was a suit for the specific performance of an alleged agreement to convey certain lots in Jersey City. One objection to the complaint was that the description in the contract was too vague and indefinite to be enforced. The alleged contract of sale was dated at Jersey City. The court said: "It may well be argued, however, that, in naming a place in the memorandum, the maker of it considered himself as speaking from that locality, not only to indicate the place where he was given a receipt for the purchase price, but also as covering the interior specifications, by number of lot, block, and streets of the location of the lands agreed to be sold." See, also, *Price v. McKay*, 53 N. J. Eq. 588, 32 Atl. 130. For the purpose of determining the sufficiency of the complaint the presumption is that the lot in question is located where the agreement is dated. We then have to assist in the identification of the real estate involved, the fact that it is lot thirty, Douglas Park, Indianapolis, Ind. If there is such an addition to Indianapolis, the identification of the lot will follow.

Appellant cites *Wilstach v. Heyd*, 122 Ind. 574, as strongly supporting the demurrer. It was a suit for damages for the alleged breach of a contract for the sale of a lot. The complaint averred that, in consideration of \$2,560 to be paid by the plaintiff to the defendants, defendants sold, and agreed to convey upon demand, certain real estate owned by the defendants, and situate in the city of New Albany, Floyd county, Indiana, described as follows: "Lot number fourteen on Ekin avenue, in the city of New Albany." The only description in the memorandum was, "The lot number fourteen, Ekin avenue," which was indorsed on the reverse side of the paper from that upon which the other parts of said written memorandum appears. The court held that if such indorsement could be construed to be a part of the memorandum, it was uncertain, and could not be enforced without the aid of parol proof to identify the lot, and sustained a demurrer to the complaint. The receipt signed by the defendants was dated at New Albany. There is an uncertainty found in the last description not in the case at bar. "Lot fourteen on Ekin avenue," New Albany. The court can not say how many additions there may be adjacent to Ekin avenue, nor how many lots numbered fourteen. This agreement was also defective in other particulars apart from the description of the land. Such description is as indefinite as lot fourteen on Washington street, Indianapolis. It will not be presumed that there is more than one lot number thirty in Douglas Park.

It may fairly be inferred also that the vendor is the owner of the property, and the exact terms of the agreement are stated. *Tewksbury v. Howard*, 138 Ind. 103, was an action to enforce specific performance. In the course of the opinion the court say: "The rule often recognized in this State is, that where the description given is consistent, but incomplete, and its completion does not require the contradiction or alteration of that given, nor that a new de-

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scription should be introduced, parol evidence may be received to complete the description. * * * *Colerick v. Hooper*, 3 Ind. 316; *Maggart v. Chester*, 4 Ind. 124; *Torr v. Torr*, 20 Ind. 118; *Guy v. Barnes*, 29 Ind. 103; *Baldwin v. Kerlin*, 46 Ind. 426; *Calton v. Lewis*, 119 Ind. 181; *White v. Stanton*, 111 Ind. 540; *Weaver v. Shipley*, 127 Ind. 526." The description was sufficient.

The next objection made to the complaint is that time was the essence of the contract, if there was a contract, and the complaint, while alleging performance, shows that the money due and payable under the contract was not paid at the time therein provided. The complaint shows that at least \$30 of the purchase money was unpaid August 8, 1899, or more than a month after the last payment was due. Upon this subject Mr. Pomeroy, in his *Equity Jurisprudence*, §1408, says: "The stipulations concerning time of performance in a contract are regarded by equity either as immaterial, or as essential, or as material. In all ordinary cases of contract, equity does not regard time as of the essence of the agreement. In all ordinary cases of contract for the sale of land, if there is nothing special in its objects, subject-matter, or terms, although a certain period of time is stipulated for its completion, or for the execution of any of its terms, equity treats the provision as formal rather than essential, and permits a party who has suffered the period to elapse to perform such acts after the prescribed date, and to compel a performance by the other party notwithstanding his own delay." Equity "does not generally view time as being of the essence of a contract, unless it appear from its terms, or by the conduct of the parties, that the design of the contractors was to render it essential." *Brumfield v. Palmer*, 7 Blackf. 227. See, also, *Ewing v. Crouse*, 6 Ind. 312; *Keller v. Fisher*, 7 Ind. 718; *Day v. Patterson*, 18 Ind. 114. It does not appear from the terms of the contract or the conduct of the

parties that time should be essential. Fry, Spec. Perf. (3d Am. ed.), §1047.

It is further claimed that the complaint was defective for the reason that the payment of the money was a condition precedent to appellee's right to a deed, and, it being shown by the complaint that \$30 of the purchase money was not paid before the beginning of the suit, it is bad for that reason also. This claim is fairly met by the averment that before the bringing of the action the amount unpaid was tendered to defendant. The condition upon which the tender was made was not prejudicial to appellant.

In *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668, the court say on page 400: "When mutual acts are to be done by two parties, at the same time, and the right of each depends upon the performance of the other, either may tender his part of the performance, upon the condition that the other performs his part; and neither is compelled to perform his part unless the other performs his part, also; as when land is bargained and sold, to be conveyed upon payment of the purchase money. In such a case neither can be compelled to perform his part of the agreement, except on performance by the other of his part; that is, the vendee can not demand the conveyance without tendering the purchase money; and the vendor can not demand the purchase money without tendering the conveyance; and either may make a good tender to the other, upon the condition that he will perform his part of the agreement." The tender upon condition that appellant would execute the deed was sufficient.

The second paragraph of answer, to which the court sustained a demurrer for want of facts, alleged that the defendant did not execute the instrument sued upon on the 15th day of March, 1899, but that he did execute the first part of the receipt which is copied there on that day; that he did not make or sign any other writing to them on said day.

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In support of this paragraph it is stated that the contract is in two parts, executed at different times, one without relation to the other,—the first containing all the description of the realty, but none of the alleged terms of sale; the second containing the terms of sale, but no description. To make a contract sufficient to take it out of the statute of frauds, it is not necessary that it should all be written on one paper. The contract may be made to appear on different papers written at different times. It is manifest that the instrument signed here relates to the same transaction, and, in its entirety, it is to be taken into account. *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279; *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382; *Pulse v. Miller*, 81 Ind. 190; *Thames Loan, etc., Co. v. Beville*, 100 Ind. 309, 314; *Roehl v. Haumesser*, 114 Ind. 311; *Austin v. Davis*, 128 Ind. 472, 476, 12 L. R. A. 120, 25 Am. St. 456; *Ransdel v. Moore*, 153 Ind. 393. It is apparent that the parties intended to make one instrument of said first and second parts. In addition the facts pleaded were provable under the general denial; and for that reason, if for no other, the court did not err in sustaining the demurrer.

It is argued that the court erred in refusing to modify the judgment, (1) because it had no power to enter an order affecting the rights of the wife of the defendant in an action in which she was not a party; (2) because it had no power to order something not provided for in the contract, if there was a contract; (3) because, in an action for specific performance, the court had no power to render a judgment in the alternative for damages. The wife was not a party. The order is not against her, but against the appellant. In brief of appellant it is stated that the court erred in overruling his motion to strike from the decree the words "a good and indefeasable title in fee simple in and to" the realty. These words do not appear in the decree. It is claimed that the motion to strike out the alternative

judgment for damages should have been sustained, because the suit was not for damages, or for the recovery of money paid.

The court found that appellee was entitled to a deed. While the court had the power to compel appellant to execute such a deed, it could not compel the wife to join in the conveyance. If the appellant failed to comply with the order of the court, the court might order restitution or compensation in such sum as the evidence justified. The amount fixed was sustained by the evidence, and the appellant given an option to comply with his agreement or make compensation. The option given appellant to make restitution in money, or execute the deed, could in no way prejudice his rights. If appellant elected not to convey the land, it was fair to require him to pay interest on the money; and if, to the sums paid by appellee, interest is added, the amount of the judgment is not excessive.

It is argued also that the appellee was not entitled to the deed demanded (a warranty deed for the lot in question subject to a certain mortgage), for the reason, as stated, that "the contract was made, if any was made, in March, 1899, prior to April 1, 1899, since, as the writing shows, the second payment of \$50 was due April 1, 1899. On April 1, after the sale, a new tax year began, and a new lien for taxes was against the property, dating from April 1, 1899. These taxes Maris was not liable for under any circumstances, and they should have been excepted from this deed." Where there is a contract to execute a conveyance, and no time is fixed for the making of the conveyance, a demand before bringing the suit is necessary. *Mather v. Scoles*, 35 Ind. 1. The converse of this proposition must be true. In the present action, under the contract, the deed was to be executed when the money was paid. The doctrine, that an unconditional tender, followed by the bringing of the money into court, is necessary, in order that the tender may be regarded as payment at the

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time, has no application to the tender required before an action is brought for the specific performance of a contract for the sale of real estate. *Hunter v. Bales*, 24 Ind. 299; *Lynch v. Jennings*, 43 Ind. 276; *Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278. So that when appellee tendered the last payment, it was the duty of appellant to offer to execute the proper deed, without any demand upon the part of appellee.

Other rulings complained of were not prejudicial to the appellant.

An examination of the record leads to the conclusion that the case was fairly tried, and a correct conclusion reached.

Judgment affirmed.

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[No. 4,832. Filed May 26, 1903.]

BILLS AND NOTES.—*Fraud as to Consideration.*—Fraud in the procurement of the contract for, or in connection with, the consideration of a negotiable promissory note, will not bar a recovery by an innocent holder. p. 246.

SAME.—*Fraud in Procuring Signature.*—Where the signature to a note is secured by fraud going to the character of the paper, its maker having no intention of signing a note, he will, in the absence of negligence in affixing his signature or in failing to discover the fraud, be no more bound by it than he would be if the signature were a total forgery. p. 246.

SAME.—*Fraud in Procuring Signature.—Answer.*—In an action on a negotiable note by an innocent holder, an answer alleging that “if the signature is genuine, it was obtained by fraud, either in substituting the note for an insurance application or reading the same incorrectly or by means of a carbon transmitter,” is insufficient, where there were no averments showing diligence on the part of defendant, and no excuse for want of negligence shown except that defendant was “not educated in the English language as it is printed.” pp. 246, 247.

From Spencer Circuit Court; *E. M. Swan*, Judge.

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Action by People's State Bank against Frank X. Ruxer. From a judgment for defendant, plaintiff appeals. *Reversed.*

L. H. Fisher, A. L. Gray, Henry Kramer, F. A. Heuring, W. L. May, C. F. Coffin and H. S. McMichael, for appellant.

W. C. Mason, W. E. Cox and W. S. Hunter, for appellee.

ROBY, J.—Suit upon a negotiable promissory note, alleged to have been executed by the appellee and indorsed to appellant by the payee, before maturity, in the regular course of business, it paying a valuable consideration therefor and being without notice of any defenses thereto. Verdict and judgment for appellee. The court overruled appellant's demurrer to the fourth paragraph of appellee's answer, and such action is assigned as error.

Fraud in the procurement of the contract for or in connection with the consideration of a negotiable promissory note, in the hands of an innocent holder, will not bar his recovery. *First Nat. Bank v. Lotton*, 67 Ind. 256; *Woollen v. Ulrich*, 64 Ind. 120; *Cornell v. Nebeker*, 58 Ind. 425; *Dutton v. Clapper*, 53 Ind. 276; *Hereth v. Merchants Nat. Bank*, 34 Ind. 380; *Thomas v. Ruddell*, 66 Ind. 326; *Brickley v. Edwards*, 131 Ind. 3, 7; *Bremmerman v. Jennings*, 61 Ind. 334; *Maxwell v. Morehart*, 66 Ind. 301.

Where the signature to a note is secured by fraud going to the character of the paper, its maker having no intention of signing a note, he will, in the absence of negligence in affixing his signature, or in failing to discover the fraud, be no more bound by it than he would be if the signature were a total forgery. *Cline v. Guthrie*, 42 Ind. 227, 13 Am. Rep. 357; *Detwiler v. Bish*, 44 Ind. 70; *Nebeker v. Cutsinger*, 48 Ind. 436; *Webb v. Corbin*, 78 Ind. 403, 406; *Baldwin v. Fagan*, 83 Ind. 447.

The fourth paragraph of answer contains averments tending to show fraud as affecting the consideration for the

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note. It contains no direct averment that appellee did not sign the note, nor that his signature was procured by fraud, except as such conclusion may be deduced by inference from the statement that, if his signature is genuine, it was obtained by fraud, either in substituting the note for an insurance application or reading the same incorrectly or by means of a carbon transmitter. No diligence on appellee's part is shown, and the only excuse attempted is that he is "not educated in the English language as it is printed." It is no hardship to require a direct statement of the defense relied upon. The averments in the pleading under consideration are in the alternative, are ambiguous, and therefore insufficient. *Wheeler v. Thayer*, 121 Ind. 64, 67; *Hatfield v. Cummings*, 142 Ind. 350, 353.

The facts stated do not show fraud in procuring the signature, and, adopting the theory disclosed by them, the answer is bad. *Kimble v. Christie*, 55 Ind. 140. If the pleading were given the construction and effect claimed for it by the appellee, it would still be insufficient for want of facts showing diligence on his part. *Lindley v. Hoffman*, 22 Ind. App. 237.

Judgment reversed, and cause remanded, with instruction to sustain the demurrer to the fourth paragraph of answer, and for further proceedings not inconsistent herewith.

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[No. 4,857. Filed May 26, 1903.]

HUSBAND AND WIFE.—*Contract of Wife to Sell Real Estate.*—*Notes.*—*Consideration.*—The individual contract of a married woman to sell real estate, and to execute a bond for a deed, is void, and constitutes no consideration for purchase-money notes. pp. 249, 250.

SAME.—*Void Contract of Married Woman.*—The contract of a married woman which is void as to her, and incapable of ratification by her, is also void as against the other party thereto. p. 250.

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HUSBAND AND WIFE.—*Void Contract of Married Woman to Sell Land.*—*Liability for Rent.*—One who takes possession of real estate under the void contract of a married woman to sell is liable for rent. p. 251.

From Rush Circuit Court; *Douglas Morris*, Judge.

Action by Nannie R. Shirk against Frank M. Stafford. From a judgment for defendant, plaintiff appeals. *Affirmed.*

J. Q. Thomas, G. H. Gifford and G. J. Gifford, for appellant.

Reuben Conner and Lon Conner, for appellee.

ROBY, J.—The trial court made a special finding of facts. It appears therefrom that the appellant was at the time of the trial, and had been for twenty-two years prior thereto, a married woman. On January 18, 1897, she was the owner in fee of a tract of land situate in Fayette county and particularly described in the finding. On such day she and the appellee entered into a written contract, in terms as follows: "Connersville, Indiana, January 18, 1897. This contract by and between N. R. Shirk and F. M. Stafford, witnesseth, that said Shirk has this day sold her ninety-acre tract of land, situate in Columbia township, Fayette county, Indiana, to said Stafford, for the sum of \$3,000. The conditions of said sale are that said Stafford is to execute his notes for the sum of \$200, due February 1, 1897, secured by collateral note of H. M. Broaddus. Two hundred dollars due two years from date, \$200 due three years from date, \$200 due four years from date, \$200 due five years from date, \$200 due six years from date, \$250 due seven years from date, and \$1,350 due eight years from date and all payable on or before date due, and drawing six per cent. interest payable annually. When \$1,400 of said purchase money is paid, said Shirk is to execute a warranty deed for said tract and said Stafford to execute a mortgage to secure the balance of purchase money. Said Shirk is to execute a bond for the execution of said deed, pay the taxes falling

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due in 1897, and said Stafford to pay all subsequent taxes. It is further agreed that said Shirk, in default of payment of any of said notes at maturity, shall be entitled to one-half the produce of said tract, which is to be held as a lien on said products and applied as payment on said note. It is further agreed that, on failure to pay any of said notes before deed is made, all previous payments shall be deemed as payment on rental for the use of said tract, and said Shirk to be entitled to possession on two months' notice. It is also further agreed that said Stafford shall apply one-half the proceeds of the products of said farm, as soon as realized upon, in discharge of the note due or next coming due; and said Shirk shall have a landlord's lien for the payment of the same."

Appellee executed his notes as agreed therein, and took possession of said land on said day. There was no other consideration for the notes than as above set out. The third and fourth notes of the series are sued upon. Appellee continued in possession of the land until the fall of 1900, when, without notice, he abandoned it, since which time appellant has repaired some of the fences thereon.

When the action was commenced appellee had in his possession corn worth \$154, and wheat worth \$100, grown on said land, which he has since sold and converted. The annual rental value of the land during the four years it was held by the appellee was \$180. Before the bringing of the suit he paid the first two notes of the series, with accrued interest, \$312 on other notes, and \$67.53 taxes. Twenty-four dollars interest had been paid on the notes in suit, and there was due and unpaid thereon \$450.66. Appellant did not execute any bond, as in the contract stipulated, prior to the commencement of the action; but during its pendency she brought a sufficient bond into court and tendered the same. No demand was made upon her for a bond. Had there been she would have executed such bond. The contract was written by her husband, who signed her

name to the same as her agent. Upon these facts the court concluded the law to be with appellee. Appellant excepted to the conclusion and has assigned error thereon.

The pleadings are voluminous, and a statement of them is not necessary to a decision of this appeal upon its merits. Appellee claims that the contract was void, the notes without consideration, and that the rental value of the land, for which he was liable, has been paid. The appellant claims that the notes were given in consideration, among other things, of an agreement to execute a valid bond, and therefore there was no want, but, at most, a failure of consideration; that possession of the land was delivered; that neither it nor the title conveyed by the wife's contract has been disturbed, and that want of title is no defense to purchase-money notes while the grantee holds undisturbed possession. A married woman has no power to encumber or convey her lands, except by deed in which her husband shall join. §6961 Burns 1901; *Luntz v. Greve*, 102 Ind. 173; *Cook v. Walling*, 117 Ind. 9, 2 L. R. A. 769, 10 Am. St. 17.

Her contract to convey was void, as her deed would have been. *Percifield v. Black*, 132 Ind. 384; *Bartlett v. Williams*, 27 Ind. App. 637; *Parks v. Barrowman*, 83 Ind. 561.

The contract being void as against her, and incapable of ratification by her, is also void as against the other party to it. *Columbian Oil Co. v. Blake*, 13 Ind. App. 680; *Hickman v. Glazebrook*, 18 Ind. 210.

In so far as *Columbian Oil Co. v. Blake*, *supra*, holds that a lease of real estate for the purpose of removing gas and oil therefrom is without the power of a married woman to make, except her husband join with her therein, it is in conflict with *Heal v. Niagara Oil Co.*, 150 Ind. 483, and in so far as it is in conflict, it is overruled. Upon the proposition to which it is cited above its authority is not impaired. It follows from the proposition stated that the invalidity of

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the contract was available to the appellee, and that such contract did not constitute a consideration for the notes in suit. The clause providing for the execution of a bond for the conveyance of the real estate is an incident to the agreement to sell. The undertaking to secure the performance of which the bond was to be given, was one the appellant could not discharge. The stipulation for such bond is a mere incident to the void contract, and as such falls with it. No bond was in fact executed by the appellant or any other person.

It is established, as contended by appellant, that where a deed for real estate is accepted by the grantee, he taking possession thereunder, he can not defeat the payment of purchase money without showing an eviction, the surrender of possession to the owner of a paramount title, or some inconvenience or expense incurred on account of the defect in the title. *Johnson v. Bedwell*, 15 Ind. App. 236; *Black v. Thompson*, 136 Ind. 611.

Appellee does not complain of any defect in the title held by appellant or conveyed to him. He did not take possession under a deed of conveyance; he took possession without any deed. Neither the contract executed nor the deed therein stipulated for had any validity. Taking possession of appellant's land he became liable to her for the rental thereof. *Mattox v. Hightshue*, 39 Ind. 95; *Forgy v. Davenport*, 146 Ind. 399, 403.

This rental value affirmatively appears to have been paid. The title to the land never passed from appellant. Appellee, therefore, never had any title to or interest in it. *Avery v. Akins*, 74 Ind. 283, 291; *Otis v. Gregory*, 111 Ind. 504, 511.

The contract of a married woman, whereby she becomes surety for another, is not void, but voidable at her election. *Bennett v. Mattingly*, 110 Ind. 197; *Plaut v. Storey*, 131 Ind. 46; *Lackey v. Boruff*, 152 Ind. 371; *Johnson v. Jouchert*, 124 Ind. 105, 8 L. R. A. 795.

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The use of the word "void" in the statute has led to some inaccuracy of expression, but the distinction between those cases involving the question of suretyship by a married woman and her inability to make a valid deed of her lands, her husband not joining therein, has not at any time been overlooked. The authorities relative to suretyship need not, therefore, be reviewed.

Judgment affirmed.

Black, J., absent. Robinson, C. J., Wiley, Comstock and Henley, JJ., concur.

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[No. 4,428. Filed May 26, 1903.]

CONTRACTS.—Mistake.—Fraud.—Where a person signs an agreement from which certain stipulations previously agreed to were omitted, and there is no relationship between the parties so as to excuse lack of care, the person so signing will be bound by the contract. pp. 254-256.

FRAUD.—Diligence.—If one fails to use ordinary care and diligence to guard against fraud and imposition, he can not obtain relief from the courts. p. 256.

TRIAL.—Recovery too Small.—Remedy.—Where plaintiff claims that the jury's answers to interrogatories entitle him to an amount greater than the general verdict, his remedy is by motion for judgment *non obstante veredicto*, and not by motion for new trial. *Madden v. Dunn*, 24 Ind. App. 505, overruled. pp. 256, 257.

APPEAL.—Harmless Error.—Error in overruling a demurrer to an answer is harmless, where the jury found for plaintiff. p. 257.

CONTRACT.—Breach.—Measure of Damages.—Where plaintiff sues for breach of a contract by which he was employed by defendant to install an electric light plant, the measure of damages is the difference between the contract price and the amount which it would have cost him to perform the contract. p. 257.

TRIAL.—General Verdict.—Answers to Interrogatories.—Conflict.—Where the facts specially found by the jury in answers to interrogatories clearly show that the jury have erred in computing the amount of recovery fixed by the general verdict, the special findings control. pp. 257, 258.

From Perry Circuit Court; *E. M. Swan*, Judge.

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Action by Harry I. Wood against William Wack. From a judgment for plaintiff granting insufficient relief, plaintiff appeals. *Reversed.*

E. C. Henning, W. C. Henning and G. W. Smith, for appellant.

I. S. Bramel, A. J. Clark and C. A. Weathers, for appellee.

COMSTOCK, P. J.—Appellant was plaintiff below. The cause has been twice tried. Upon the first trial a verdict was returned in favor of the appellant for \$300, and his motion for a new trial was sustained. Upon the second trial a verdict was returned in his favor for \$250, upon which verdict judgment was rendered. He moved the court for judgment for \$1,160.68, on the answers to interrogatories returned by the jury with the general verdict.

The complaint alleges that on the 18th day of August, 1899, the appellant, in writing, proposed to install for the appellee, at the town of Troy, Indiana, for the sum of \$4,145, an electric light plant, complete; that on the 21st day of August, 1899, the appellee, in writing, accepted this proposal (the terms of the payment were agreed upon, and attached to the proposal and acceptance, all being referred to as exhibits A and B); that appellant was preparing to perform his part of the contract, and was ready and willing at all times to do so; that on September 9, 1899, the appellee wrongfully repudiated the contract and refused to be bound by it; that the appellant could have earned the sum of \$1,160.68 out of said contract, and prays damages in that sum. The exhibits referred to are filed with the complaint. To this complaint appellee filed an answer in two paragraphs, the second paragraph of which was a general denial. The first alleged, in substance, that appellee was a priest; that he had long and favorably known Beckman, Dilger & Co., of Ferdinand; that these people,

together with appellant, had constructed an electric light plant in that town, which was in successful operation; that after appellee had determined to erect an electric light plant in the town of Troy, where he lived, he inspected the plant at Ferdinand, and, being satisfied as to its capacity, and the manner in which it was constructed, and with its operation, he ascertained from his friends, Beckman, Dilger & Co., that the appellant had constructed the electrical part of said plant; that soon thereafter Beckman, Dilger & Co. brought about the introduction of appellant to appellee at the town of Troy; that negotiations were taken up, and an understanding reached, whereby a duplicate of the Ferdinand plant was to be installed for appellee at Troy; that appellant was to do the electrical part of said work, and that the latter were to guarantee the proper construction and successful operation of said plant; that the said agreement was reached between appellant, appellee, and Beckman, Dilger & Co., and was well understood by each of the parties interested; that appellant reduced to writing, on his own stationery, what purported to be the agreement, and stated that it did contain the agreement, and that appellee signed it, believing and understanding that the verbal agreement was embodied in the written agreement, and having no reason to believe otherwise; that appellant knew that said writing did not contain said verbal agreement, and that he had left it out for the fraudulent purpose of obtaining a wrongful advantage over appellee; that so soon as appellee discovered said fact, and before the rights of any innocent third person had intervened, and before appellant had expended any time or money on said contract, he notified appellant that he would not be bound by said writing.

It is averred in the answer that at the time he executed and signed said paper he "did not give any attention to the wording of the beginning and closing" of said alleged contract; that he "only gave his thought and concern to the

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make, style, and character of the engine and boiler and the dynamo, the character of the lamps and other material to be used in the construction of the plant." It thus appears that he failed to read that part of the contract showing the parties thereto.

The questions discussed are the action of the court in overruling appellant's demurrer to the appellee's amended answer in one paragraph, and in overruling appellant's motion for judgment on the answers of the jury to interrogatories, notwithstanding the general verdict. In *Robinson v. Glass*, 94 Ind. 211, the Supreme Court, speaking by Elliott, J., says: "Ordinarily, one contracting party has no right to rely upon the statements of the other as to the character or contents of a written instrument (this, indeed, is only another form of stating the general rule); but while this is true, it is also true that if a known trust and confidence is reposed in the person making the representations, and there is a relationship justifying such trust and confidence, then the person to whom the representations are made may rely upon them." *Shaeffer v. Sleade*, 7 Blackf. 178; *Peter v. Wright*, 6 Ind. 183; *Bischof v. Coffelt*, 6 Ind. 23; *Matlock v. Todd*, 19 Ind. 130; *Worley v. Moore*, 77 Ind. 567; 2 Parsons, Contracts (7th ed.), 774. See, also, *Nebeker v. Cutsinger*, 48 Ind. 436; *Dutton v. Clapper*, 53 Ind. 276; *Miller v. Powers*, 119 Ind. 79, 4 L. R. A. 483.

In Pomeroy, Eq. Jurisp. (2d ed.), §892, the rule is thus stated: "As a generalization from the authorities, the various conditions of fact and circumstance with respect to the question how far a party is justified in relying upon the representation made to him may be reduced to the four following cases, in the first three of which the party is not, while in the fourth he is, justified in relying upon the statements which are offered as inducements for him to enter upon certain conduct: (1) When, before entering into the contract or other transaction, he actually resorts

to the proper means of ascertaining the truth and verifying the statement. (2) When, having the opportunity to make such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. (3) When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties. (4) But when the representation is concerning facts of which the party making it has, or is supposed to have, knowledge, and the other party has no such advantage, and the circumstances are not those described in the first or second case, then it will be presumed that he relied upon the statement; he is justified in doing so."

The facts pleaded do not show that appellant sustained a relation of trust and confidence to appellee. It is a fundamental principle that a man is bound to use ordinary care and diligence to guard against fraud and imposition, and that, if he fails to do so, he can not obtain relief from the courts. *Clodfelter v. Hulett*, 72 Ind. 137, 144, and cases cited. It appears from the averments of the answer that the relation of appellant and appellee were not such as to justify the existence of trust and confidence. Appellee was an intelligent man—a man of affairs. It is not alleged that the agreement in question was not read to him, nor that he did not have an opportunity of reading it, before affixing his signature thereto. He had had no business, and no previous acquaintance, with appellant. The means of information as to the nature and contents of the agreement were within his immediate reach, and he neglected to avail himself of them, when it was clearly his duty to do so. To hold that, under the circumstances, he was excused from so doing, would be a dangerous precedent.

It is contended by appellee that the remaining specification of error discussed represents no question, for the reason that if appellant claimed that the answers to interrogatories entitled him to an amount greater than that

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given by the general verdict, he should have moved for a new trial. The following cases hold that the proper remedy is by motion for judgment *non obstante veredicto*: *Brickley v. Weghorn*, 71 Ind. 497; *Schaffner v. Kober*, 2 Ind. App. 409; *Froman v. Rous*, 83 Ind. 94; *Adamson v. Rose*, 30 Ind. 380. *Madden v. Dunn*, 24 Ind. App. 505, cited by the appellee, is in conflict with the foregoing decisions. The decisions of the Supreme Court are controlling. It is therefore overruled.

The first paragraph of answer was pleaded in bar. The court erred in overruling the demurrer thereto, but, as the jury found for the appellant, the ruling was harmless.

The question being properly presented by the motion for judgment on the answers to interrogatories, is appellant entitled to an amount greater than that fixed by the verdict? The measure of damages for the breach of the contract in question is "the difference between the contract price, the amount which he would have earned and been entitled to recover on performance, and the amount which it would have cost him to perform the contract." *Fairfield v. Jeffreys*, 68 Ind. 578, and cases cited.

In *Froman v. Rous*, *supra*, the court say: "We have no doubt that a plaintiff may be awarded a larger sum than that stated in the general verdict, if the answers show him entitled to it. Where the facts specially found clearly show that the jury have erred in computing the amount of recovery, there is a conflict between the answers and the general verdict, and the former must control. There may be an inconsistency between a general verdict and the answers to interrogatories, although the general verdict is favorable to the party who prays judgment on the answers."

The answers to interrogatories show every fact essential to establish the averments of the complaint. They show that the contract price of the work was \$4,145, and that it would have cost appellant to perform the contract \$2,-

984.32. The difference, \$1,160.68 is the amount which appellant is entitled to recover.

The judgment is reversed, with instruction to sustain appellant's motion for judgment on the answers to interrogatories for \$1,160.68.

Robinson, C. J., Wiley, Roby, and Henley, JJ., concur; Black, J., dissents.

INDIANA CLAY COMPANY v. BALTIMORE & OHIO
SOUTHWESTERN RAILROAD COMPANY.

[No. 4,433. Filed May 26, 1903.]

RAILROADS.—*Fires from Locomotives.*—*Contributory Negligence.*—*Instructions.*—An instruction in an action for damages to plaintiff's buildings, caused by fire escaping from defendant's locomotive, that the jury, in determining whether or not plaintiff was guilty of contributory negligence, might consider, along with the other circumstances of the case, the character and age of the shingles on the roofs of the buildings and their inflammable character, and also whether or not plaintiff maintained any water appliances at its plant at the time of the fire, was erroneous; since a person has the right to construct a building on any part of his property and enjoy the same without reference to the proximity of a railroad, and he is not required to keep his property in such condition as to guard against the negligence of the railroad company. pp. 260, 261.

SAME.—*Fires from Locomotives.*—*Duty of Owner of Property.*—An instruction in an action for damages caused by fire escaping from defendant's locomotive to plaintiff's buildings that if plaintiff or any of its officers or servants had knowledge of the fire it was its duty to extinguish it as speedily as possible was erroneous, as the law requires only reasonable efforts, under the circumstances proved, to prevent loss. p. 262.

NEGLIGENCE.—*Proof of One of Several Acts of Negligence Charged.*—*Instructions.*—*Railroads.*—*Fires.*—Where in an action for damages for fire escaping from a locomotive the complaint charged that the fire was caused by a live coal or spark negligently emitted from the locomotive, that the spark-arrester was defective and that the engineer was operating the engine in a negligent manner, an instruction that plaintiff in order to recover must prove all of the acts of negligence charged was erroneous, as proof of either act of negligence shown to be the proximate cause of the injury was sufficient. pp. 262, 263.

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APPEAL AND ERROR.—Evidence.—Objects Used in Illustration Not in Record.—The failure to make drawings of objects used as mere reference in a trial, for the purpose of illustration, a part of the record on appeal is not a sufficient reason for disregarding the entire evidence, when a vital issue in the case can be determined without the inspection of the object to which reference has been made. *pp. 264, 265.*

From Knox Circuit Court; *O. H. Cobb*, Judge.

Action by the Indiana Clay Company against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for defendant, plaintiff appeals. *Reversed.*

Hiram McCormick, F. Givin, C. B. Rogers, J. T. Rogers, A. J. Padgett, J. A. Padgett, W. A. Cullop and G. W. Shaw, for appellant.

W. R. Gardiner, C. G. Gardiner, T. D. Slimp and E. Barton, for appellee.

COMSTOCK, P. J.—Appellant was plaintiff below. The complaint, in substance, alleges that the appellant was the owner of certain real estate in the town of Shoals, Indiana, adjacent to the railroad of the appellee; that buildings had been erected thereon; that they were supplied with tools, machinery, and appliances for the manufacture of stoneware, brick, and tile, and constituted what is called a pottery plant. In June, 1900, they were all consumed by fire. It is alleged that the fire was caused by sparks and coals of fire from a passing locomotive of the railroad company.

The negligence charged is that the locomotive was not equipped with a proper spark-arrester; that the spark-arrester and screen on the locomotive had become worn and burned full of large holes, through which sparks and live coals of fire were negligently permitted to escape, and thence to be carried by the wind and air to the buildings of plaintiff, and set them on fire. The action was brought in the circuit court of Martin county. The venue was changed to the circuit court of Knox county after the issues were closed by a general denial. A trial resulted in a verdict and judgment in favor of appellee.

The reasons for a new trial question the sufficiency of the evidence, the legality of the verdict, and the action of the court in giving and refusing to give certain instructions. For reasons that appear, we consider only the last reason above stated. Appellee has filed no cross-error, but in its brief questions the sufficiency of the complaint. The complaint is at least sufficient to bar another action for the same cause.

Instruction ten, given at the request of appellee, as modified, is as follows: "In determining the question as to whether or not the plaintiff was guilty of contributory negligence in the matter of the firing of its pottery plant, the jury may consider, among all of the other circumstances of the case, whether or not it had in the smoke-stack of the pottery plant, or in some other proper place, any spark-arrester. The jury may also consider, along with the other circumstances of the case, the character and age of the shingles on the roof of the building which it is claimed was first fired, and the kind of wood of which they were made, and the manner in which they were on the roof, and their inflammable character, and also whether or not the plaintiff clay company was in the habit of maintaining or did maintain any water appliances at its pottery plant at the time of the alleged fire." This was error. Contributory negligence can not be predicated upon such facts. A party has the right to construct buildings on any part of his property, and enjoy the same, without reference to the proximity of a railroad. Such use of his property can not be declared contributory negligence in an action against the railroad company for negligently setting fire to the buildings. He is not required to keep his property in such condition as to guard against the negligence of the company. He may proceed upon the theory that the railroad company will not injure him by its negligence. He is not required to anticipate and take precautions against the negligence of third persons. *Pittsburgh, etc., R. Co. v. Indiana Horse-*

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shoe Co., 154 Ind. 322, and cases cited; Thompson, Negligence (2d ed.), §2327; *Philadelphia, etc., R. Co. v. Hendrickson*, 80 Pa. St. 182, 21 Am. Rep. 97; *Cook v. Champlain Transp. Co.*, 1 Denio 91; *Kalbfleisch v. Long Island R. Co.*, 102 N. Y. 520, 7 N. E. 557, 55 Am. Rep. 832; *Burke v. Louisville, etc., R. Co.*, 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; *Cincinnati, etc., R. Co. v. Barker*, 94 Ky. 71, 21 S. W. 347; *Kellogg v. Chicago, etc., R. Co.*, 26 Wis. 223, 7 Am. Rep. 69; *Salmon v. Delaware, etc., R. Co.*, 9 Vroom 5, 20 Am. Rep. 356; *Delaware, etc., R. Co. v. Salmon*, 10 Vroom 299, 23 Am. Rep. 214; *Richmond, etc., R. Co. v. Medley*, 75 Va. 499, 40 Am. Rep. 734; *Snyder v. Pittsburgh, etc., R. Co.*, 11 W. Va. 14, 18 Am. Rep. 154; *Boston Excelsior Co. v. Bangor, etc., R. Co.*, 93 Me. 52, 44 Atl. 138, 47 L. R. A. 82; *Ross v. Boston, etc., R. Co.*, 6 Allen 87; *Flynn v. San Francisco, etc., R. Co.*, 40 Cal. 14, 6 Am. Rep. 595; *Vaughan v. Taff Vale R. Co.*, 3 H. & N. 743, 750; Shearman & Redfield, Negligence (5th ed.), §680; 8 Am. & Eng. Ency. Law, 16; *Chicago, etc., R. Co. v. Smith*, 6 Ind. App. 262; *Chicago, etc., R. Co. v. Kern*, 9 Ind. App. 505; *Louisville, etc., R. Co. v. Richardson*, 66 Ind. 43, 32 Am. Rep. 94; *Pittsburgh, etc., R. Co. v. Jones*, 86 Ind. 496, 44 Am. Rep. 334; *Chicago, etc., R. Co. v. Burger*, 124 Ind. 275.

Instruction four requested by appellant and refused is as follows: "While the owner of property in danger of loss is charged with the duty of saving it from destruction if he can do so with the exercise of reasonable care and precaution, yet he is not bound to use unusual care and caution in anticipation that it may be negligently destroyed by another; so that if in this case the plaintiff's property was negligently set on fire by sparks from one of the locomotives of the defendant, while it was the duty of appellant to save it from destruction, if it could do so by the exercise of reasonable care and caution, yet it was not bound to use the care and precaution of providing water-works

and appliances as means of extinguishing the fire, and its failure to do so would not constitute contributory negligence." It should have been given. See authorities last above cited.

In instruction six, requested and refused, appellant asked a charge concerning the origin of the fire, to the effect that it might be proved by circumstances, and that if the circumstances disclosed by the evidence were such as to justify the inference that the fire which caused the injury was emitted from the locomotive of the appellee, then the jury would be authorized to find from such circumstances that the locomotive was the origin of the fire; that whether it was or was not was a fact for the jury to determine from the evidence of the case. The court modified the instruction by inserting the word "negligently" before the word "emitted." This was error. It made proof of the origin of the fire to depend entirely upon the question of negligence in its emission from the locomotive. *Garfield v. State*, 74 Ind. 60; *Davis v. Hardy*, 76 Ind. 272; *Unruh v. State, ex rel.*, 105 Ind. 117. In instruction fifteen, given by the court of its own motion, the court charged the jury that if the appellant, or any of its officers, agents, or servants, had knowledge of the fire, it was its duty to extinguish it as speedily as possible. The law requires only reasonable efforts, under the circumstances proved, to prevent loss. *Wabash R. Co. v. Miller*, 18 Ind. App. 549; *Louisville, etc., R. Co. v. Porter*, 16 Ind. App. 266; 1 Thompson; Negligence (2d ed.), 169.

In instruction number one, given at the request of the appellee, as modified, the jury were told that in order for the appellant to recover, it had to prove by a preponderance of the evidence four propositions, and that if it had failed to prove "either one of these four propositions" it could not recover, and their verdict should be for the appellee. The first proposition was that the property destroyed was first fired by a live coal or spark that had been negligent-

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ly emitted from the smoke-stack of one of the appellee's locomotive engines. The second was that the spark-arrester in the engine was defective, worn out, or had a hole or holes in it, and had been negligently allowed to be in that condition. The third was that the engineer, at the time of the fire, was operating the engine and spark-arrester in a negligent manner. The fourth was that the appellant was not guilty of negligence in contributing to the fire.

In instruction number seven, given at the request of the appellee, as modified, the jury were told that in order for the appellant to recover it must show by a preponderance of the evidence "the contrary of each" of certain propositions set out "regarding the duty of the defendant," failing in which their verdict should be for the defendant. These propositions regarding the duty of the defendant "the contrary of each" of which the appellant was required to prove, were as follows: (1) To have its engine equipped with a spark-arrester of modern design, and such as is ordinarily and generally used by well managed railroad companies in the class of engines to which it belonged; (2) that the spark-arrester was as good in kind as any known; (3) that it was properly constructed and adjusted in the engine, in accordance with its design, so that it would perform its functions; (4) that it was in good repair; (5) that it was being operated by a skilled engineer. Proof of every averment in the complaint is not always necessary. This is true in the case before us. Proof of either act of negligence charged, if it was the proximate cause of the injury, was sufficient.

Instruction thirteen, given by the court of its motion, told the jury that the plaintiff was not absolutely bound to remove any old shingles or other combustible material; in number five, given at the request of appellant, as modified, the jury were told that plaintiff was not guilty of negligence if its buildings were covered with dry shingles; in number three, given at the request of the appellant, as

modified, that it was not guilty of negligence in "not covering the building with non-combustible material; in number ten, given at the request of appellee, as modified, that the right to consider the age and character of the shingles on the roof, * * * the kind of wood of which they were made, * * * and their inflammable character," in determining whether appellant was guilty of negligence in the matter of the firing of its building. We think that these instructions tended to mislead the jury.

Appellee argues that the evidence should not be considered because it affirmatively appears that the record does not contain all that was given at the trial. Further, that the instructions complained of, "even if erroneous, are not fatally inapplicable to facts in respect to which evidence might have been given under the issues." The argument is based solely upon the proposition that the screen taken from the locomotive in use at the time of the fire, and a model locomotive used by the witness Kellogg, were exhibits to the jury, and referred to by witnesses in their testimony, and that no drawings of them are in the record. The screen and the model were described by the witnesses. They were used for collateral purposes. They had no connection whatever with the question of the contributory negligence of appellant. Mere reference to objects for the purpose of illustration is not a sufficient reason for disregarding the entire evidence, when a vital issue in the case can not depend upon the inspection of the object to which reference has been made. The evidence of the screen and model, and oral testimony in connection with them, could not affect the question of the contributory negligence of the appellant in the firing of its property. We do not discuss the authorities cited by appellee in this connection (*Thorne v. Indianapolis Abattoir Co.*, 152 Ind. 317; *South Bend, etc., Co. v. Geidie*, 24 Ind. App. 673) for the reason that whether the question (as said in *Johnson v. Wiley*, 74 Ind. 233) can be considered and determined

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in the absence of a part of the evidence must depend upon the record in the particular case. The rule that all the evidence given in a case must appear in the record is not universal. There are cases where it would be useless to set out all the evidence. If the record is in such condition as fully and fairly to show that an error has been committed, then the question may be determined to be properly presented, although some parts of the evidence be omitted from the record, provided it also affirmatively appears that the omitted evidence does not directly bear upon or affect the ruling complained of. *Johnson v. Wiley, supra*. The record before us is in a condition fairly to show that error was committed in reference to the instructions herein considered upon the question of the contributory negligence of the appellant, and said instructions numbered one and seven would not be applicable to facts in respect to which evidence might have been given under the issues. Other instructions are complained of, and the sufficiency of the evidence to sustain the verdict is denied. We express no opinion upon other alleged errors.

The judgment is reversed, with instruction to sustain appellant's motion for a new trial.

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[No. 4,788. Filed June 2, 1903.]

MUNICIPAL CORPORATIONS.—Vacation of Street.—Objection by Property Owner.—A person competent to object to the vacation of a street as a property owner, under §§3648, 3650 Burns 1901, must be a property owner immediately upon the street or the part thereof to be vacated. *p. 268.*

SAME.—Vacation of Street.—Injunction.—A complaint by a property owner upon a street, but not abutting the part sought to be vacated, is insufficient to entitle plaintiff to injunctive relief, where the facts pleaded do not show that any special damages will result to plaintiff's property by the proposed vacation. *pp. 266-269.*

From Clinton Circuit Court; *J. V. Kent*, Judge.

Suit by Minerva J. Hall against the city of Lebanon and others. From a judgment for defendant, plaintiff appeals. *Affirmed.*

P. H. Dutch, for appellant.

J. T. Dye, S. M. Ralston, S. R. Artman, H. C. Sheridan and *C. M. Bounell*, for appellees.

ROBINSON, C. J.—Transferred from the Supreme Court under the act of March 12, 1901.

Appellant seeks to enjoin the vacation of a portion of a public street. The error assigned rests upon the ruling of the court sustaining a demurrer to the complaint.

The complaint avers that appellant is a resident taxpayer in appellee city, and owns certain real estate which abuts and is situated adjacent to Jamestown avenue, and immediately upon the line of the avenue; that certain persons, named, petitioned for the vacation of a part of the avenue, the petition alleging that it was not of public utility, and that all the abutting property owners had signed the petition except the appellee railway company, which filed a waiver of notice; that this petition was by the council referred to the street committee which recommended that the matter be referred to the city commissioners which was done. It is further averred that no notice was given of the meeting of the commissioners, and that appellant did not know of the meeting until after the commissioners had viewed the street; that at her first opportunity, and while a majority of the commissioners were yet together, she presented to one of them her remonstrance, objecting to the competency of some of the commissioners, and that the proposed vacation would be a detriment to her, would greatly inconvenience the public traveling over the avenue, and would not be of public benefit and utility; that before the report of the commissioners was acted on she presented to the council an additional remonstrance, objecting to the competency of certain commissioners, that the report failed to state the names of all the property owners and to describe

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•the property that would be affected, that the petitioners gave no notice, and that no notice was given of the meeting of the commissioners; that the council illegally and wrongfully refused and neglected to appoint competent commissioners. It is further averred that the report of the commissioners in favor of the vacation of the street was adopted, in disregard of appellant's remonstrance, and under the pretense that appellant had no right to object to the competency of the commissioners; that the action of the council in adopting the report was illegal because of the incompetency of the commissioners, which alleged incompetency is set out in the complaint; that appellee railway company is threatening to and is about to take possession of that part of the street vacated, and that the other appellees will appropriate to their own use such portion of the street unless restrained from doing so; that appellant "will be greatly damaged" if the council is permitted to carry into execution the report of the commissioners; that she will suffer certain inconvenience in reaching the main part of the city; that the council illegally and wrongfully adopted the report of the commissioners, in consideration that the petitioners and the railway company execute a deed to the city of a certain street, and that it is a part of a scheme to have the part of the street vacated in order to procure the removal of the company's depot; that the action of the commissioners in refusing to allow appellant's remonstrance and sustain her objections to the competency of such commissioners was wrongful, and that the approval of the report by the council was illegal and void. The petition and all of the proceedings of the council pertaining to the vacation are filed with and made part of the complaint.

The statute (§3647 Burns 1901) provides the proceedings to be had by the common council in the vacation of streets. Section 3648 Burns 1901, after prescribing certain duties of the city commissioners, provides: "In case any

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property owner immediately upon the line of said street, alley, highway or square, or part thereof, sought to be vacated, who is directly interested therein shall object to such vacation, the city commissioners shall report such fact to the common council." Section 3650 Burns 1901 fixes the duty of the council as to the report of the commissioners and provides: "The common council shall have no power to order such vacation when objected to by property owners adjacent thereto." Whether an aggrieved property owner in street vacation proceedings is limited to the remedy by appeal from such proceedings, as argued by appellee's counsel, or whether he may ask a court of equity to enjoin the proposed vacation, as claimed by counsel for appellant, the court, in *House v. City of Greensburg*, 93 Ind. 533, without considering the question of practice, decided upon its merits, on appeal from a decree denying an injunction to restrain the city from vacating a street. However, if injunction be the proper remedy, the complaint is insufficient.

When §§3648, 3650, *supra*, are construed together, as they must be, we think it clearly the intention of the legislature that a person competent to object to the vacation of the street, as a property owner, must be a property owner immediately upon the street or the part thereof to be vacated. Where a part only of a street is to be vacated, a property owner upon that street, but not upon the part to be vacated, is not a competent objector, as a property owner, to the vacation. See *House v. City of Greensburg*, *supra*. Appellant's complaint does aver that she owns property abutting upon the particular street and immediately upon the line thereof, but it does not aver that she is the owner of property immediately upon the line of the proposed vacation. And by the report of the commissioners, a copy of which, together with all the proceedings of the council, is made a part of the complaint, it is shown that appellant's property is not adjacent to that portion of the street sought to be vacated, and is not immediately upon the line

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thereof, but is more than one square away. As an objecting property owner upon the street at the place where the same is to be vacated, she has not shown herself to be within the statute.

The complaint does not show that any special damage will result to her property by the proposed vacation, and conceding, without deciding, that a property owner upon the particular street, but not abutting the part to be vacated, might be so specially injured by a proposed vacation as to be entitled to injunctive relief, the facts pleaded do not make such a case. Certain facts are averred to show that inconvenience will result to appellant from the proposed vacation, but it is an inconvenience that will result to the general public also, and is clearly insufficient to require injunctive relief. See *Dantzer v. Indianapolis Union R. Co.*, 141 Ind. 604, 34 L. R. A. 769, 50 Am. St. 343, and cases there cited.

Judgment affirmed.

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[No. 4,454. Filed June 4, 1903.]

MUNICIPAL CORPORATIONS.—*Liability for Care of Smallpox Patient.*—

A person afflicted with smallpox of a malignant character was discovered in a populous part of the city. The city health officer was absent from the city and a physician with written authority from the health officer to act in his stead, and under the directions of the secretary of the state board of health, employed plaintiff to care for the patient, quarantined the house, and placed guards around the same. The city paid the guards, but refused to pay plaintiff's claim. *Held*, that the city is liable.

From Wells Circuit Court; *J. P. Hale*, Special Judge.

Action by Bettie Monroe against the city of Bluffton. From a judgment for defendant on demurrer to complaint, plaintiff appeals. *Reversed*.

Levi Mock, John Mock and George Mock, for appellant.
C. E. Sturgis, for appellee.

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ROBINSON, C. J.—On September 23, 1901, one Smith, having no means or property whatever, came to appellant's home, in a thickly populated part of the city, afflicted with smallpox of a malignant character. Dr. Horne had previously been appointed secretary of the board of health for the county and for appellee, and a few days prior to the above date gave Dr. Spaulding, a duly qualified practicing physician, written authority to act as such health officer during Dr. Horne's absence, after which Dr. Horne absented himself from the city and county and never afterward acted or assumed to act as such health officer. From the time of such appointment, and for forty days continuously thereafter, neither the county nor city had any health officer other than Dr. Spaulding, the city and mayor failing to make any appointment and to provide any pest-house. On the above date, Dr. Spaulding, acting under this appointment, and also verbal directions of the secretary of the state board of health directing him immediately to quarantine the house to prevent the spread of the disease and protect the health of the citizens, quarantined the house and placed guards around the same to prevent either ingress or egress, and ordered and contracted with appellant to take charge of Smith and nurse and care for him, and agreed that appellee should pay appellant, who was in indigent circumstances, therefor. Appellant believed at the time that Dr. Spaulding was the health officer of the city, and under the agreement with him she nursed and cared for Smith twenty-two days, worth a certain sum per day. During the twenty-two days her house was quarantined and guarded she was not permitted to leave the premises and no one was permitted to enter. The city paid the guards Dr. Spaulding contracted with for guarding the house.

Error is assigned upon sustaining a demurrer to a complaint averring substantially the above facts.

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Section 6711 *et seq.* Burns 1901 provide for the creation of a state board of health which "shall have the general supervision of the health and life of the citizens of the State;" the election by such board, of a secretary who "shall be the health officer of the State," and "who shall perform such duties as are prescribed by this act, or may be required by the board." Section 6718 Burns 1901 provides that "The trustees of each town, the mayor and common council of each incorporated city, except where a regularly constituted board of health by statute or by ordinance of such city exists or may hereafter be created, and the board of commissioners of each county shall constitute a board of health *ex officio*, for each town, city and county, respectively of the State, whose duty it shall be to protect the public health by the removal of causes of diseases when known, and in all cases to take prompt action to arrest the spread of contagious and infectious diseases, to abate and remove nuisances dangerous to the public health, as directed or approved by the state board of health and perform such other duties as may from time to time be required of them by the state board of health pertaining to the health of the people. They shall elect a secretary who shall be the health officer of the appointing board. * * *

The state board of health shall have the power to remove at any time, any county, city or town health officer," for causes specified. "In case of the death or removal of any town, city, or county health officer, the vacancy thereby created, shall be immediately filled by the president of the board of trustees of the town, or the mayor of the city, or the county auditor as the case may be and such appointee shall hold office for the unexpired term of the health officer whose place he takes. * * *

All county, city and town health officers shall have and possess the statutory and common law powers of constables in all matters pertaining to the public health."

These statutory provisions not only give local boards of health authority to take the necessary action to prevent the spread of contagious and infectious diseases, but they make it their duty to do so in all cases, and that they shall take prompt action in such matters. No more important duty rests upon the State than the preservation of the public health, and to secure and protect the public health against the very dangerous and contagious disease of small-pox the local instrumentalities and agencies created by the State are required to act promptly and effectively. "By the provisions of the statute creating the state board of health," said the court in *Blue v. Beach*, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. 195, "the imperative duty to protect the public health by the removal of causes of diseases when known, and to take prompt action to arrest the spread of contagious diseases, and to perform such other duties as may from time to time be required by the state board, is expressly enjoined upon all local health boards."

It is true the secretary of the board of health does not have absolute authority independently of the board in matters pertaining to the public health, and we approve the doctrine announced in *Board, etc., v. Fertich*, 18 Ind. App. 1, and *Martin v. Board, etc.*, 27 Ind. App. 98, cited by counsel for appellee, but they are clearly distinguishable from the case at bar. Those opinions expressly indicate that circumstances might exist that would require a different holding. In *Board, etc., v. Fertich, supra*, it was held that the purpose of this statute is to protect the public health and "In carrying such purpose into effect according to the meaning of the statute, it might become the duty of the county, under particular circumstances, to supply medical service, medicines, nurses, shelter, fuel, food, and raiment for patients taken for the time being under the control of the board, and placed in such situation that such provision would be a necessary part of the protection of the public health. We do not mean to indicate what would be the

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proper conclusion in this regard in other cases than that which we now have to decide." And in *Martin v. Board, etc., supra*, it is said, "Whether, in a given case, an emergency might arise, requiring immediate action by the secretary, is not presented."

Even if it be conceded that under a strict and literal interpretation of the law appellant could not recover, yet, as said by the court in *Board, etc., v. Cole*, 9 Ind. App. 474, "Courts are not, however, always required to give full force to the exact letter of the law, but are oftentimes permitted, nay, more, required, to relax somewhat the rigor of an exact compliance. *Schmidt v. State*, 78 Ind. 41; *City of Evansville v. Summers*, 108 Ind. 189."

In *Board, etc., v. Cole, supra*, a physician recovered for services rendered in a county where he had not procured license to practice, the services having been rendered under a pressing emergency and urgent necessity that would not admit of delay. See *Orr v. Meek*, 111 Ind. 40; *Lamar v. Board, etc.*, 4 Ind. App. 191.

It is true that the general rule is well established that a person dealing with the agent of a municipality must take notice of the limit of his powers and must know whether the authority assumed is within the statute. But it must be conceded that the facts pleaded show an emergency existed requiring immediate action. A person afflicted with smallpox of a malignant character was discovered in a populous part of the city. Immediate action to prevent the spread of the disease was required. The officer charged with this duty was absent and had been for some days. The statute does not contemplate that a city shall be without a health officer, but provides that when there is a vacancy the place shall be filled immediately by the president of the board of trustees or mayor of the city. Dr. Spaulding was qualified to act as health officer, and, acting upon the authority given him by the regularly appointed health officer

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and upon instructions from the secretary of the state board of health, he did the only proper thing that could be done, and quarantined the house and placed guards around it to prevent ingress or egress into or from the premises. And his action thus far was afterwards ratified by appellee when it paid the guards thus appointed for their services. And when he went one step further and did what the dictates of humanity and a proper regard for the safety of the public health would require in every such case, and employed a nurse to care for the patient, it is claimed there is no liability for such services because he was not authorized to contract for such employment. However, we think it may rightfully be said that the employment of a nurse to care for a person suffering from smallpox in a malignant form was an essential precautionary measure to prevent the spread of the disease, and that all that Dr. Spaulding did was one entire transaction, which appellee must repudiate or ratify as a whole.

Moreover, the city was without a regularly appointed health officer who could act when the emergency arose. The public at large, and especially the inhabitants of appellee city, were vitally interested in having precautionary measures against the spread of the disease taken immediately. Appellant and her premises were properly quarantined, and by one assuming to have authority to act. He did nothing that appellee itself might not have done (*Board, etc., v. Bader*, 20 Ind. App. 339), but did only what the city in the proper exercise of its duty under the circumstances was required to do. We think that when all the facts and circumstances are taken into consideration, the emergency that existed, the purpose for which the services were performed, the object sought to be accomplished, the necessity that existed that the services be performed, the law implies a promise to pay the reasonable value of appellant's services. See *City of Logansport v. Dykeman*, 116 Ind. 15.

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We think the complaint states a cause of action for the value of the services rendered as nurse. As to the claim for bed clothing destroyed by appellant, sufficient facts are not averred to show a liability on the part of appellee.

Judgment reversed.

HARROLD v. FUENFSTUECK.

[No. 4,426. Filed June 5, 1903.]

APPEAL AND ERROR.—Evidence.—A verdict can not be disturbed on conflicting evidence. *p.* 275.

SAME.—Briefs.—Rules of Court.—Alleged errors in the admission of testimony and the giving and refusing to give certain instructions will not be reviewed on appeal, where counsel for appellant in the preparation of their brief failed to comply with the fifth subdivision of rule twenty-two, requiring “a concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript.” *p.* 276.

From Laporte Superior Court; *H. B. Tuthill*, Judge.

Action by Minnie Fuenfstueck against John Harrold. From a judgment for plaintiff, defendant appeals. *Affirmed.*

C. R. Collins and *J. B. Collins*, for appellant.

J. F. Gallaher, for appellee.

BLACK, J.—This was an action brought by the appellee against the appellant to recover for board and lodging furnished and washing done by the former for the latter for a period of a number of years.

It is assigned here that the court erred in overruling the appellant's motion for a new trial. The recital of evidence in appellant's brief shows a conflict upon the material facts, such that the verdict can not be disturbed on the grounds stated in the motion for a new trial—that it is not sustained by sufficient evidence, and that it is contrary to law.

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Counsel for the appellant assert in their brief that the court erred in giving instructions to the jury, and in refusing to give an instruction asked by the appellant; also, in relation to the admission of testimony.

It is insisted earnestly by counsel for the appellee that the appellant has not presented any of these matters adequately, because of failure to comply sufficiently with the rule of this court relating to the contents of the appellant's brief, which, under the fifth subdivision of rule twenty-two, must contain, in the order there indicated, before any argument in support of the brief, "a concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript."

Counsel for the appellant, in their brief, have indicated the numbers of the instructions concerning which it is claimed the court erred, and, in connection with the numbers, have referred to pages and lines of the transcript; but they have not set out any of the instructions, or stated succinctly or otherwise the substance of any instructions. Concerning alleged errors in the admission of testimony, counsel for appellant, in their brief, have made references to reasons in the motion for a new trial, stating the numbers and the substance of the reasons, indicating pages and lines of the part of the transcript containing the motion for a new trial; but they have not, in their brief, in any instance, indicated by pages and lines, or otherwise, the places in the bill of exceptions where the testimony in question, the objection and exception, and the ruling of the court may be found. The objection of counsel for the appellee must be sustained because of such insufficiencies in the brief for the appellant, which, in general, is quite inadequate, leaving this court to search the record and to perform the work of the attorney.

Judgment affirmed.

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BATEMAN v. BENNETT.

[No. 4,619. Filed June 5, 1903.]

DESCENT AND DISTRIBUTION.—Property of Childless Second Wife.—

Testator left surviving him a childless second wife and children by a former marriage. He gave to his wife such portion of his estate as she would take under the statutes then in force in the absence of a will. Under the statutes then in force (§2487 R. S. 1881), as construed by the Supreme Court, such wife took a fee, and the children by the former marriage, at her death, became her forced heirs. Plaintiff brought suit to recover the interest of her deceased husband in the real estate devised to his stepmother. The complaint showed that plaintiff's husband died before his stepmother. *Held*, that plaintiff could not recover.

From Warrick Circuit Court; *E. M. Swan*, Judge.

Suit by Lavina Bateman against Jacob U. Bennett. From a judgment for defendant, plaintiff appeals. *Affirmed*.

Edward Gough, R. W. McBride and C. S. Denny, for appellant.

S. B. Hatfield and F. H. Hatfield, for appellee.

WILEY, J.—This cause was transferred from the Supreme Court.

Appellant's amended complaint avers the following material facts: That one James Adams died testate; that at the time of his death he was seized in fee simple of certain real estate in Warrick county, Indiana; that he left surviving him Zilpha, who was a childless second wife, Rachael Conner, a daughter, and Homer Adams, a son, children by a former marriage; that by item two of his will the testator left to said Zilpha "such parts, portion, and interest in my [his] real and personal property as she would take under the statutes of Indiana, now [1874] in force, if I had made no will;" that by item three he devised all of his estate to his two children, subject only to the then statutory interest of his widow; that said testator died in 1875, and there-

upon the said heirs and devisees agreed to a partition of the real estate, and each selected a commissioner, who divided the same by metes and bounds into three parts; that said division was agreed to and accepted by all the parties; that quitclaim deeds were executed by the two children of the testator, in each of which his widow joined, conveying in severalty to said two children the third of the real estate thus apportioned and set off to them by the commissioners, and that "no deed was made by said children to said Zilpha." It is then averred that said widow always believed that the will gave her a life estate only in the one-third of her deceased husband's lands, and accepted the share so set off to her as such one-third, took possession of the same, never claimed that her estate therein was other than a life estate, and admitted such to be the fact. The complaint further avers that appellant was married to Homer Adams, one of the testator's children, in December, 1876; that he died intestate in June, 1877, leaving her as his sole heir; that at the death of said Homer he owned all the lands devised to him by his father's will, and that all such lands thereupon descended to her. It is also charged that she never parted title with any part of the land set off to said Zilpha by the commissioners, and that she still owns a half interest therein; that on September 28, 1889, said Zilpha conveyed to appellee Bennett, by quitclaim deed, all the land that the commissioners had assigned to her, and that she died in September, 1898. The complaint also avers that appellee is in possession of the real estate conveyed to him by Zilpha; that when he accepted said deed, and under which he claims title, he was aware that the said Zilpha only claimed a life interest therein, and that by the terms of said will the fee simple in the undivided half of James Adams' lands vested in her (appellant's) husband, Homer Adams, subject to the life estate of Zilpha Adams in one-third thereof, and that such one-half interest vested in her (appellant) at her said husband's death. There are further

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allegations as to what disposition Rachael Conner made of her interest in the real estate in controversy, but it is not essential to refer to them in detail. Appellee's demurrer to the complaint was sustained, and such ruling is assigned as error.

The question for decision depends upon the character of the estate which Zilpha Adams took in the real estate set off to her under the private agreement for partition. It is clear that appellant's complaint proceeds upon the theory that she took only a life estate, and her counsel admit that if she took a fee the complaint does not state a cause of action.

The provisions of the will upon which appellant relies as designating the estate of the testator's widow are as follows: "Item 2. It is my will and desire and I hereby bequeath to my beloved wife such parts, portion, and interest, both in my real and personal property, as she would take under the statutes of Indiana now in force if I had made no will. Item 3. It is my will and desire that the whole of my real and personal property, including that which may be left at the death of my said wife, be divided into two equal parts, and one-half of which I hereby bequeath to my son Homer Adams and the other half I will and bequeath to Isaac W. Adams, trustee, in trust to manage in his discretion for the use of my daughter Rachael Conner, wife of Thomas Conner."

When the will was executed and became operative the following statutes were in force: §2483 R. S. 1881. "If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors." This section also has a provision reducing her interest as to creditors if the real estate exceeds in value \$10,000. Section 2486 R. S. 1881 provides: "If a husband die intestate leaving a widow and one child only, his real estate shall descend, one-half to his widow and one-half to his child." Section

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2487 R. S. 1881 provides: "That if a man marry a second or subsequent wife, and has by her no children, but has children alive by a previous wife, the land, which, at his death, descends to such wife, shall, at her death, descend to his children."

By a construction of these several statutes it was held in *Martindale v. Martindale*, 10 Ind. 566, that a childless second or subsequent wife took a life estate only in the lands of her deceased husband, when he left surviving him children by a former wife. Many cases following that adhered to the rule there declared, and this was the law in this State until 1881, when the case of *Utterback v. Terhune*, 75 Ind. 363, was decided. It was there held that under the sections quoted a second or subsequent childless wife took a fee in the lands of her deceased husband, and that, if he left children by a former wife, upon the death of the second or subsequent wife such children would inherit the real estate which vested in her as her forced heirs. The rule as there declared has been followed in the following cases: *Haskett v. Maxey*, 134 Ind. 182, 19 L. R. A. 379; *Myers v. Boyd*, 144 Ind. 496; *Stephenson v. Roody*, 139 Ind. 60; *Byrum v. Henderson*, 151 Ind. 102. In *Bell v. Shaffer*, 154 Ind. 413, it was held that children of a former marriage have no present estate in the interest of a childless second or subsequent wife in the real estate of their father. Under these statutes and decisions, Zilpha Adams took a fee in one-third of her husband's real estate, and she took a "present estate." Homer Adams, appellant's deceased husband, had no present interest in the real estate set off to her, and, as he died before the death of Zilpha, he had no inheritable interest in the real estate, and appellant therefore could take nothing, for she could not inherit from her husband that which he did not possess.

Counsel have discussed the question as to what interest Zilpha claimed or thought she took in the real estate, but we do not think that it is necessary to dwell upon it in

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view of the fact that the law determined her interest, and the provision of the will is in harmony with the provisions of the statute and the decided cases. It was the evident intention of the testator to give to her every right and interest in his real estate which the statute cast upon her. In such case we may disregard the will and look to the statute.

In *Denny v. Denny*, 123 Ind. 240, the court, by Chief Justice Mitchell, said: "Indeed, it may be doubted whether the will was not an absolute nullity so far as it related to the claimant, since by its terms precisely the same provision was made for her as that made by the statute. In such a case, the law takes the preference and casts the estate, and the will is inoperative." To the same effect are *Stilwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240, and *Davidson v. Koehler*, 76 Ind. 398.

Appellant's complaint does not state facts sufficient to constitute a cause of action, and the demurrer to it was properly sustained. Judgment affirmed.

TEVIS v. HAMMERSMITH ET AL.

[No. 4,248. Filed January 28, 1903. Rehearing denied April 1, 1903. Appeal to Supreme Court dismissed June 5, 1903.]

CORPORATIONS.—*Stockholder's Suit*.—*Demand*.—A suit by a stockholder of a corporation against an officer thereof, for the benefit of the corporation, may be maintained, without showing a demand upon the board of directors to bring the suit, where the complaint discloses a condition of facts which renders it reasonably certain that a suit by the corporation would be impossible and that a demand therefor would be useless. p. 283.

SAME.—*Stockholder's Suit*.—A complaint by a stockholder against the president of the corporation for the benefit of the corporation and its stockholders for the possession of certain iron pipe, and for an accounting, alleging that the corporation was organized for the purpose of constructing a system of water-works and had purchased a quantity of iron pipe; that the corporation had abandoned its purpose, forfeited its right, ceased entirely to hold directors' meetings and the directors had abandoned their offices;

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that the iron pipe had greatly advanced in price and the president was selling the same far below the market price at a profit to himself, states a cause of action. pp. 282-291.

From Clark Circuit Court; *J. K. Marsh*, Judge.

Suit by John Tevis against Louis Hammersmith and others. From a judgment for defendant on demurrer to complaint, plaintiff appeals. *Reversed*.

Helm, Bruce & Helm, C. D. Kelso, J. V. Kelso, C. L. Jewett and H. E. Jewett, for appellant.

Clarence Dallam, Jacob Herter, G. H. Hester and G. H. Voigt, for appellees.

ROBY, C. J.—The record shows an amended complaint, to which demurrers for want of facts were sustained. The plaintiff refused to plead further, and appeals from a judgment against him, assigning error upon such action of the court. The suit was instituted by appellant as a stockholder of the Home Crystal Water Company, for the benefit of the corporation, against the president and the other appellees.

It may be stated generally that foundation for such suits is furnished by the existence of either of the following enumerated conditions: (1) Some action, or threatened action, by the board of directors or trustees, beyond their power; (2) a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party or among themselves, causing injury to the corporation or stockholders; (3) action by the board of directors, or a majority of them in their own interest, and in a manner destructive of the corporation, or the rights of the other stockholders; (4) where a majority of the stockholders are illegally and oppressively pursuing a course in the name of the corporation, which is in violation of the right of the other stockholders, and can only be restrained by a court of equity. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Dodge v. Woolsley*, 18 How. 331,

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15 L. Ed. 401; *Board, etc., v. Lafayette, etc., R. Co.*, 50 Ind. 85, 100; *Carter v. Ford Plate Glass Co.*, 85 Ind. 180; *Wayne Pike Co. v. Hammons*, 129 Ind. 368; *Cook, Corp.* (5th ed.), §645; *Clark & Marshall, Priv. Corp.*, §536.

The complaining party must have had no share in the acts, nor have ratified them. He must bring his suit seasonably. He must show to the court that he has exhausted all the means within his reach to obtain redress within the corporation. He must make a good-faith and reasonable effort to induce the corporation to bring the suit itself. *Hawes v. Oakland, supra*; *Taylor v. Holmes*, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. Ed. 179; *Cook, Corp.* (5th ed.), §740; *Clark & Marshall, Priv. Corp.*, §543.

It is ordinarily necessary to show a demand upon the board of directors to bring suit, and a refusal upon their part; but the law does not require idle ceremonies, and when it is made to appear that a demand would have been unavailing,—as when the corporation is under the control of the wrongdoers, “in the hands of its enemies,”—such facts are sufficient. *Wayne Pike Co. v. Hammons, supra*; *Rogers v. Lafayette, etc., Works*, 52 Ind. 296; *Board, etc., v. Lafayette, etc., R. Co., supra*; *Carter v. Ford Plate Glass Co., supra*; *Thompson, Corporations*, §4500; *Cook, Corporations*, §741; *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118. The demand upon the board and its refusal to act are stated by an approved author “material and issuable, if controverted they must be proved. If proof of them fails the whole foundation of the plaintiff’s action is gone.” *Pomeroy, Eq. Jurisp.*, §1095.

The exception contended for by appellant is stated as follows: “This condition of fact, however, is not indispensable. The action may be maintainable without showing any notice, request, or demand to the managing body, or any actual refusal by them to prosecute; in other words, the refusal may be virtual.” After stating the exception created when the corporation is shown to be in the hands

of the wrongdoers, so that a refusal may be implied with reasonable certainty, the section quoted concludes as follows: "In like manner when the plaintiff's pleading discloses any other condition of fact which renders it reasonably certain that a suit by the corporation would be impossible and that a demand therefor would be nugatory the action may be maintained without averring a demand or any similar proceeding on the part of the stockholder plaintiff." Pomeroy, Eq. Jurisp., §1095. This statement of the basis upon which a formal demand may be omitted is logical, and accords with equitable and correct principles. It is fairly deducible from the authorities, and is therefore adopted as expressive of the law.

The amended complaint under consideration is not carefully constructed. A large portion of it is devoted to the enumeration of matters occurring after the institution of the action, which, if relevant, should have been brought into the record by supplemental complaint, and not by amendment. *Barker v. Prizer*, 150 Ind. 4. Eliminating surplusage, its material facts are: That the Home Crystal Water Company is an Indiana corporation; that plaintiff was the owner of a large majority of the capital stock thereof before the transfer of property referred to, and at the time of the institution of the suit; that the corporate purpose was to construct a system of water-works in New Albany, and supply water to the citizens of said city; that the corporation secured a contract with the said city, empowering it to construct and maintain such system, a time limit for the construction thereof being contained therein; that, failing to comply with its undertaking, said corporation had abandoned its purpose and forfeited its right under such contract; that prior to such forfeiture it had purchased a large amount of iron pipe. Before the delivery thereof the price of iron pipe advanced, largely increasing the value of the pipe. After such rise in value the defendant Arlund, who was then president of said company, "did,

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for the purpose of making a personal profit to himself, at the cost of said Home Crystal Water Company, and without the authority or consent of the board of directors of said corporation, agree with the said codefendants, Gheens, Bush, and Parker, to sell and transfer the said pipe to them at a price far below the market price of said pipe at the time of said contract with his said codefendants. The purpose of said arrangement and transfer was to transfer the benefit of the contract which the said company had theretofore made for such pipe, and thus enable Gheens, Bush, and Parker to get the advantage of the rise in the price of iron pipe, for which transfer a bonus or money consideration was to be paid by the said Gheens, Bush, and Parker to the said Arlund." Notice to the purchasers of the facts connected with the transaction is averred. It is further averred that upon the delivery, in New Albany, of said pipe, by the manufacturer, it was stored, warehouse receipts issued therefor to P. Arlund & Co., and thereafter from time to time said Gheens, Bush, and Parker, with the connivance and assistance and consent of said Peter Arlund, sold and delivered to the purchasers diverse amounts of said pipe, from which sales they realized a sufficient amount of money to repay them the greater part of, and, as the plaintiff believes, the entire purchase price which they had paid for all said pipe to the manufacturer thereof under the contract which said water company had with said manufacturer; thus satisfying him in full, and leaving a large amount of pipe on hand in New Albany, representing the profit on said transaction. That after the failure of the enterprise of the water company and its forfeiture of its rights under the contract with the city, and long before the institution of this action, the water company ceased to maintain any office or place of business, and the directors thereof abandoned their offices as directors, and ceased entirely to hold directors' meetings, and had held no such meetings for many months

prior to the institution of this action. That plaintiff knew that the corporation had purchased said pipe, and that portions of it were being sold, but that he did not know who claimed to be the owner of that part remaining in the possession of the warehousemen, and did not know for whom they claimed to hold the same. He alleges the fact that if he had demanded of Arlund, then president of said water company, that a suit be instituted to recover said pipe and restrain its further disposition, such demand would be the cause of its being immediately shipped out of the jurisdiction of the court, and would defeat the purpose of the plaintiff to recover or secure said pipe for the benefit of said corporation. That if a meeting of the board of directors could have been gotten together for the purpose of making a demand upon the board of directors to institute such action, this could not have been accomplished without said Arlund being notified of said called meeting and of such demand, because he was then a member of the board of directors, as well as president of the corporation; and that if such a meeting had been called, or such a demand had been made, the effect would have been that said pipe would have been shipped out of the State of Indiana before any action could have been brought, and thereby the purpose of the action would have been defeated.

The action is brought for the benefit of the corporation and its stockholders, and judgment is asked for the possession of the pipe, and, in default thereof, judgment for its value and for an accounting. The facts averred are sufficient to furnish foundation for an action by the corporation against Arlund and his co-appellees. The law will permit no speculation by an officer at the expense of and to the detriment of his corporation. *Wayne Pike Co. v. Hammons, supra*; *Cook, Corp.*, §650.

The averment that appellant owned the majority of the stock of the corporation does not strengthen his case in so

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far as his right to maintain the action is concerned, but tends to weaken it. By virtue of such ownership he had power to retrieve the wrong complained of within the corporation. Lack of time to call and hold a meeting of the stockholders is, however, sufficient to excuse such action, and we think such lack of time is shown by this complaint. In its absence the action can not be maintained. *Dunphy v. Travelers, etc., Assn.*, 146 Mass. 495, 16 N. E. 431; *Morawetz, Priv. Corp.* (2d. ed.), §§240-242; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827. That no meetings had been held by the directors for some time, and that the enterprise for the prosecution of which the corporation had been created had been abandoned is not in itself an excuse for action by other than the corporation. In *Taylor v. Holmes*, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. Ed. 179, the date of incorporation was 1853. The decision was rendered in May, 1888. It was alleged that in 1861 the officers of the corporation were "driven off by the defendants, and that thereafter, by the death and resignation of its officers and directors or the greater part thereof, it became utterly disorganized and never held any meetings of directors or stockholders since the year 1862, so that at the time of the filing of the bill there was but one director of the corporation living and surviving, within the knowledge of the complainants; and it is alleged that he, by his acts and doing and connections with the defendants in and touching pretended claim or claims adversely to the interest of said corporation, and its stockholders and creditors, has rendered himself incompetent to assert and protect the [its] rights." The court said: "No effort was made to call together the stockholders to take any action on the part of the company, or to elect other directors, or to obtain any united action in the assertion of the claims now set up." The case is distinguishable from the one at bar in that a reason is shown absolutely precluding such delay in the institution

of the action as would be necessary to call and hold a stockholders' meeting at which to elect officers and directors who could and would act in the premises.

It may further be observed that federal cases, decided since the adoption of rule ninety-four, requiring a demand to be shown prior to the institution of a stockholder's suit, are not controlling in this State, where such requirement depends upon equitable principle, and not upon a rule of court. The restrictive character of such provisions do not attach to the equitable principle. *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46. It is well settled, however, that a nonuser of its franchises by a corporation in Indiana may furnish cause for a judicial declaration of forfeiture, but it does not in itself amount to forfeiture. *Logan v. Vernon, etc., R. Co.*, 90 Ind. 552.

It does not follow, however, that the condition of the corporation and the attitude of its officers toward it are not to be taken into account in determining whether the pleading states facts "rendering it reasonably certain that a suit by the corporation would be impossible." The number of its directors is not averred. No by-law or other provision governing the calling of directors' meetings is averred. The affirmative allegations exclude other directors than Arlund from participating in the alleged fraud at the time of its inception. They presumptively constituted a majority of the board. Hence had a meeting of the board taken place, it would be presumed, in the absence of qualifying facts, that correct action would have followed. To excuse the failure to call a meeting of the directors, appellant avers, in substance, that an attempt to do so would have resulted in giving warning to the alleged wrongdoer, and thereby rendered any action thereafter taken futile. It is clear that the mere error in judgment of the directors of a corporation is not sufficient to justify the courts in taking control of the corporate business at the instance of

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an individual stockholder. Such management may be corrected by the selection of new directors and otherwise, but in itself it furnishes no basis for a stockholder's suit. Morawetz, Priv. Corp. (2d ed.), §243.

The strength of appellant's position does not lie in any one fact, but in the combination of them all. A corporation, deserted by its directors, its purposes abandoned, its secondary franchise forfeited and lost by a change in the market, is in position to realize, not only the price it had agreed to pay for pipe, of which it can make no use, but a large profit thereon. Its president, a member of the directory, takes advantage of his official position, and seeks to secure the profit in the transaction for himself and his associates outside the corporation. Unless immediate action is taken the property will be removed beyond the jurisdiction of the court.

While the complaint does not show that the directors had resigned their offices, it does show that they had "abandoned" them, and the condition stated could only exist in connection with indifference and inattention to their official duties. It is undoubtedly true that, in order to make an efficient demand upon the directors for the institution of a suit, it would be necessary that a meeting be held. A demand made upon the individual separately would not be sufficient. *Junction R. Co. v. Reeve*, 15 Ind. 237; *Allemong v. Simmons*, 124 Ind. 199; Cook, Corporations (5th ed.), §713a; Clark & Marshall, Priv. Corp., §677.

The larger share of the loss suffered by the corporation would in the end fall upon the stockholder having the larger interest. In view of the attitude assumed by Arlund, president and member of the board, and of the condition to which affairs had come, it is not difficult to infer that a demand would have been ineffective; and the more easily so since before it could be made, the suit would have become of no avail.

In the interest of fair dealing, having regard to the allegations which on their face show an indefensible course of conduct, giving to each circumstance its own weight and the added weight to which it is entitled by reason of its connection with the other circumstances alleged, it is held that a virtual refusal by the governing authorities of the corporation to bring the suit is shown.

Judgment reversed and cause remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent herewith.

ON PETITION FOR REHEARING.

ROBY, C. J.—In support of the petition for a rehearing it is earnestly insisted that “this court erred in holding that appellant’s amended complaint was sufficient upon demurrer, without stating when the appellant acquired the stock in his hands—whether before or after the alleged fraudulent transactions on the part of the Home Crystal Water Company’s officers.” The point stated was urged by appellees in their original brief. It was answered by appellant in his reply brief. The amended complaint contains an allegation as follows: “Plaintiff is, at the time of the institution of this action, and for a long time prior thereto was, the owner of a large amount, to wit, a large majority, of the capital stock of said corporation, and was the owner of a large amount of said stock before any of the alleged or pretended sales or transfers of property hereinafter referred to, and herein complained of.” It did not become, in view of the foregoing, necessary to decide the legal propositions urged by appellant.

It is further asserted that appellant’s remedy was by injunction, that no warrant existed for the appointment of a receiver, and that this court failed to consider the point. The prayer of the amended complaint is for judg-

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ment for the possession of the property, or for its value, and for an accounting. No question involving the appointment of a receiver is presented by the demurrer.

Petition overruled.

AVERY MANUFACTURING COMPANY v. EMSWELLER.

[No. 4,445. Filed June 16, 1903.]

SALES.—Delivery.—The law only requires such a delivery as is consistent with the nature and situation of the thing sold, and with the relations of the parties to the sale. *p. 293.*

SAME.—Threshing Machinery.—Delivery.—Where threshing machinery sold was to be delivered at a designated place, but by a subsequent arrangement between the parties it was agreed that the machinery should be accepted as it stood, the buyer can not successfully defend an action on the purchase-money notes on the ground that the machinery had not been delivered to the place first designated. *pp. 292-294.*

From Franklin Circuit Court; *F. S. Swift*, Judge.

Action by the Avery Manufacturing Company against William Emsweller. From a judgment for defendant, plaintiff appeals. *Reversed.*

M. W. Hopkins, R. T. MacFall and C. F. Jones, for appellant.

WILEY, J.—Appellant sued appellee upon two notes, and to foreclose a chattel mortgage securing their payment. Upon issues being duly joined, the cause was tried by the court, resulting in a general finding for appellee.

Appellant's motion for a new trial was overruled, and the correctness of this ruling is challenged by the assignment of errors.

Under the motion for a new trial, the only question that need be considered is the sufficiency of the evidence to sustain the finding.

The notes in suit were given as an evidence of the unpaid purchase price of an engine, separator, and threshing outfit, sold by appellant to appellee. This same threshing outfit had previously been sold by appellant to one Hinton, who had given a mortgage to the vendor to secure the payment of the unpaid purchase money. Hinton defaulted in the payment, and, by virtue of the provisions of the mortgage, appellant took possession of the property, advertised it for sale, and itself became the purchaser. At the time of the sale, the engine and separator were upon the farm of one McCoy, in Rush county, where it had been left by Hinton at the close of the threshing season of 1898. Appellee gave a written order for the purchase of the property, and in that order it was provided that appellant was to deliver it to him at a place designated. Appellee defended below upon the ground that appellant had failed to deliver the separator according to the terms of the contract, that Hinton had taken possession of it, and that it never came into his possession. Appellee went to McCoy's, took actual possession of the engine, removed it to his mill, and used it there till the threshing season of 1899 began. Appellant claimed, by way of reply, that, though the contract provided that the property was to be delivered to appellee at a designated place, yet by a subsequent arrangement it was agreed that it should remain at McCoy's, to do his threshing, and was to do it before he did any other job. In the correspondence between the parties it plainly appears from the letters written by appellee that he purchased the property as it stood on the McCoy farm. When he took the engine away, to use in his mill, he was asked if he was not going to take the separator, and he replied that he expected to leave it there,—meaning on the McCoy farm, where it was. After he brought the engine back to commence threshing, and found that Hinton had taken and was using it, he commenced a replevin suit against him, in which he made an affidavit that he owned and was en-

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titled to the possession of it. He afterwards dismissed the replevin suit, on the advice of an attorney, on the ground that appellant should have brought the action.

There is no contradiction in the evidence upon any material fact, and it clearly appears that all the property purchased, and for which the notes were given, was delivered to appellee according to the agreement, understanding, and intention of the parties. The law only requires such a delivery as is consistent with the nature and situation of the thing sold, and so, when the goods are ponderous or bulky, or can not conveniently be delivered manually, or where they are not in the personal custody of the seller, actual delivery is dispensed with, and symbolical or constructive delivery will suffice. Story, Sales (4th ed.), §§311-311b; Benjamin, Sales (7th ed.), §§674-698; 21 Am. & Eng. Ency. Law, 550.

The law recognizes the fact that all species of personal property are not capable of the same kind of possession, and requires only that a purchaser or donee should take such possession as the character and nature of the property admit of. And in the many cases in which an actual delivery of the property sold is impossible or impracticable it is not required, but a constructive or formal delivery is deemed sufficient. 14 Am. & Eng. Ency. Law (2d ed.), 374, and cases there cited.

Another rule relating to delivery is that, in determining what is necessary to constitute a sufficient change of possession, due regard must be had to the character of the property, the nature of the transaction, the position and relations of the parties to the sale, and the intended use of the property. *Montgomery v. Hunt*, 5 Cal. 366; *Lay v. Neville*, 25 Cal. 545; *Hewett v. Griswold*, 43 Ill. App. 43; *Kipp v. Lamoreaux*, 81 Mich. 299, 45 N. W. 1002; *Tunell v. Larson*, 39 Minn. 269, 39 N. W. 628; 14 Am. & Eng. Ency. Law (2d ed.), 375.

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The notes in suit were given as an evidence at purchase price of an engine, separator, and lamb fit, sold by appellant to appellee. The engine until fit had previously been sold by appellee at once who had given a mortgage to appellant on the property apart from the unpaid purchase price of the engine, separator, and lamb in the payment, and, by the fact that the engine was sold to appellee as sold to appellee mortgaged it for sale, and that after the sale it was time of the sale of the engine, separator, and lamb, the fact that appellee did take possession of farm of one McCoy's, and left the separator there because Appellant desired it. He could have taken actual possession of the separator, and removed it, as he did the engine, if he had desired. The parties agreed between themselves as to what should constitute a delivery, and appellant did all that was necessary to be done in order to put the property completely and unconditionally at the disposal of appellee. This was sufficient. Mechem, Sales, §§1186, 1187; Stephens v. Gifford, 137 Pa. St. 219, 20 Atl. 542, 21 Am. St. 868; Pinkham v. Mattax, 53 N. H. 600; Gray v. Davis, 10 N. Y. 285; Phillips v. Ocmulgee Mills, 55 Ga. 633. See, also, Aultman, etc., Co. v. Nilson, 112 Iowa 634, 84 N. W. 692.

The evidence does not support the verdict. Judgment reversed, and the court below is directed to sustain appellant's motion for a new trial.

ELLIS, ADMINISTRATOR, v. BAIRD.

[No. 4,419. Filed June 17, 1903.]

ORS AND ADMINISTRATORS.—*Claims Against Decedents' Estates.*—

—No error was committed in the trial of a claim against t's estate for board and care of decedent in his last illness in refusing to admit testimony of a witness as to a statement made at the time of the purchase of groceries for the family, claimant and her family living at the time with decedent, claimant not being present at the time the statement was made. pp. 296, 297.

SAME.—*Claims Against Decedents' Estates.*—*Care of Decedent.*—*Evidence.*

—In the trial of a claim against a decedent's estate for board and care of decedent in his last sickness, a verified claim of claimant's husband, for the same kind of services, and rendered at the same time as that embraced in plaintiff's claim, was properly excluded. p. 297.

SAME.—*Claims Against Decedents' Estates.*—*Care of Decedent.*—*Evidence.*

—*Refreshing Memory.*—In the trial of a claim against a decedent's estate, for board and care of decedent, the court erred in refusing to permit a witness to testify to the articles of provisions furnished by him to decedent by refreshing his memory by reference to plaintiff's bill. p. 297.

SAME.—*Claims Against Decedents' Estates.*—*Evidence.*—*Physicians.*—

Cross-Examination.—Where in the trial of a claim against a decedent's estate a physician as a witness for defendant testified that he treated decedent during his last sickness, stating the number of times medicine was given and who administered it, no error was committed in permitting plaintiff to ask him, on cross-examination, for what diseases he treated decedent. pp. 297, 298.

SAME.—*Claims Against Decedents' Estates.*—*Care of Decedent.*—*Evidence.*

—Where in the trial of a claim for board and care of decedent it appeared that claimant and her family lived at the home of decedent at the time of the rendition of the services, the court erred in refusing to permit defendant to prove that plaintiff said, as she was starting for the home of decedent, that she would have to go there and do the washing and cooking for the old gentleman, and take care of him, that the old gentleman was to furnish the provisions for her family. pp. 298, 299.

SAME.—*Claims Against Decedents' Estates.*—*Care of Decedent.*—*Contracts.*

—*Evidence.*—Where the person rendering the services and the person for whom they are rendered are members of a family living together as one household and the services appertain to such condition, an implication of a promise on the part of the recipient to

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pay for the services does not arise from the mere rendition and acceptance thereof, but the service will be presumed to be gratuitous; and, to support a recovery therefor, the burden is upon the plaintiff to show an express contract for compensation, or such circumstances as manifest a reasonable expectation on his part of compensation therefor. *p. 299.*

From Hendricks Circuit Court; *T. J. Cofer*, Judge.

Claim by Ella Baird against Eldridge R. Ellis, administrator of the estate of James A. B. Baird, deceased. From a judgment for plaintiff, defendant appeals. *Reversed.*

J. P. Allee, for appellant.

G. W. Brill and *G. C. Harvey*, for appellee.

COMSTOCK, P. J.—Appellee, plaintiff below, the wife of W. H. H. Baird, who is a son of James A. B. Baird, deceased, filed her claim against the estate of said decedent for cooking, waiting upon, nursing, washing for, and boarding decedent, as well as washing for and boarding his two sons, including loss of bed clothing and other garments from the 1st of September, 1899, to the 18th day of October, 1900, at which time the said decedent died. The cause was put at issue by general denial, and a trial by jury resulted in a verdict and judgment in favor of appellee for \$533.33 1-3.

The overruling of appellant's motion for a new trial is the only error assigned.

The refusal to admit certain testimony is set out, with other reasons, in the motion for a new trial. An objection to the following question propounded by appellant to Martha E. Baird, a witness introduced by appellee, was sustained: "I will ask you to state, Mrs. Baird, if you heard any statement made to the merchant from whom these groceries were purchased—these groceries that were used there by Mrs. Baird for her family—as to whom these groceries should be charged. You may state what was said, if anything, in your presence on that subject." The witness

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had previously testified that she was with Thomas, a son of the decedent, when certain groceries were purchased that were used in the family. Claimant was not present. In this there was no error.

Appellant offered to introduce in evidence the verified claim of W. H. H. Baird, husband of claimant, pending in court against said estate, for the same kind of services, and rendered at the same time as those embraced in claimant's claim. It was properly excluded.

The court refused to permit Oscar Stanley, a witness offered by the appellant, to testify, over the objection of the plaintiff, in response to the following question: "I will ask you, to refresh your memory, to refer to that bill and tell the jury what provisions you furnished the old man Baird in the year from September, 1899, to the 18th day of October, 1900, and the kind of goods and provisions you furnished, if any." The offer was not to introduce the bill in evidence, which would have been improper—the memorandum not having been made by the witness, and not being an original entry—but to tell what provisions were furnished decedent, after refreshing his memory from looking at the bill. A witness may refresh his memory by any means at hand. The court erred in excluding the question.

Dr. Charles T. Hope testified in behalf of appellant that he had, as a physician, treated the decedent during the months of August and September, a part of the time in which appellee claimed for services. He testified as to the number of times medicine was given to the decedent, and by whom the medicine was administered. Upon cross-examination the court permitted the following question: "What ailed him?" to which he answered: "He suffered from a complication of diseases. Primary underlying disease was a disease of the heart." He also testified that he suffered from disease of the kidneys and from hernia. Also the following question: "What did you treat him

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for, doctor? Did you treat him for all those diseases that you have described?" To which he answered: "Yes, sir, I did." The questions were objected to on the grounds that they were not proper cross-examination, and called for matters that were confidential and privileged. There was no error in the ruling.

Appellant offered to prove by two witnesses (Minnie Ladowe and Eva Hodson, competent witnesses for the appellant) that appellee, at the time she was starting for the home of the deceased in Hendricks county, stated that she would have to go there and do the washing and cooking for the old gentleman, and take care of the old gentleman, and that the old gentleman was to furnish the provisions for his family and for her family, and that she intended to do that until she got another place. In view of the evidence showing the persons composing the household, and the manner in which its affairs were conducted, this testimony was material and important. A strong inference arises from the facts proved that the understanding of appellee of the terms upon which she was going to the home of her father-in-law, attempted to be proved, was carried out. The jury should have had the benefit of the testimony. It was the theory of the defense that if there was any contract, express or implied, it was that the husband of appellee or the husband of appellee and the appellee, were to take care of the decedent for the home and provisions furnished. The evidence shows that Ella Baird, appellee, is the wife of W. H. H. Baird, a son of the decedent; that the decedent, his two sons, Albert and Thomas, the claimant and her husband and their three children, occupied the house of the decedent—lived and ate together as one household and one family—from the 1st of September, 1899, to the 18th day of October, 1900, on which date decedent died. The vegetables that were used on the table came from the decedent's garden; the milk and butter from his cows; the meat and lard from his hogs; the fruit

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from his orchard. The decedent furnished flour, sugar, and coffee for the use of the family. It is in evidence, not contradicted, that the appellee stated that decedent furnished the provisions. The washing for the entire family was done in the same tubs at the same time, the husband assisting his wife. The evidence shows that they were all living together as one family. Appellee and her husband each testified that there was no contract between decedent and appellee. The care and attention given the decedent was given by his sons, including the husband of the appellee, and the appellee.

“Where the person rendering services and the person for whom they are rendered are members of a family living together as one household, and the service appertains to such condition, an implication of a promise on the part of the recipient to pay for the services does not arise from the mere rendition and acceptance thereof, but the service will be presumed to be gratuitous; and, to support a recovery therefor, the burden will be upon the plaintiff, who rendered the services, to show an express contract for compensation or such circumstances of the services as manifest a reasonable expectation on his part of compensation therefor.”

We have considered the questions in the order in which they have been argued. Numerous other alleged errors are discussed, but the questions thus presented may not arise upon a second trial, and they are not, therefore, considered.

The judgment is reversed, with instruction to sustain appellant's motion for a new trial.

NOYES CARRIAGE COMPANY v. ROBBINS.

[No. 4,402. Filed June 17, 1903.]

PLEADING.—Verdict in Excess of Demand.—Presumption on Appeal.—

Where the verdict returned was for an amount in excess of that demanded in the complaint, and there was evidence sustaining the verdict, the demand made in the pleading will be deemed, on appeal, to have been amended to meet the amount of damages proved and found in favor of the plaintiff. *pp. 300, 301.*

SAME.—Verdict in Excess of Demand.—New Trial.—That the verdict is for an amount in excess of the demand in the complaint can not be presented by motion for new trial, where the facts stated and the evidence entitle the plaintiff to recover the amount found. *p. 301.*

From Elkhart Circuit Court; *J. D. Ferrall*, Judge.

Action by Ollie B. Robbins against the Noyes Carriage Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

J. S. Dodge and *J. S. Dodge, Jr.*, for appellant.

H. C. Dodge, for appellee.

ROBINSON, C. J.—Appellee's complaint avers that the "defendant is indebted to him in the sum of \$238.91 for work and labor done and performed by plaintiff for said defendant under a special agreement to and with said defendant, a bill of particulars of which work and labor done is filed herewith, made a part hereof, and marked exhibit A," and that the same is due and unpaid. Appellee asked judgment for \$238.91 and "all other proper relief." The complaint was filed May 31, 1901, and on January 13, 1902, a jury gave appellee a verdict for \$258.08.

The complaint is questioned by an assignment of error. The exhibit filed with the complaint is simply a memorandum of a certain number of hours' work. It does not state for whom the work was done, what the wages per hour were, or that anything is due appellee from anyone. It furnishes no aid whatever in construing the complaint.

Noyes Carriage Co. v. Robbins.

But we think the complaint, when questioned first on appeal, is sufficient to show that appellant is indebted to appellee in a certain sum, which appellant agreed to pay appellee for work and labor. The complaint does not necessarily count on a special contract, requiring that appellee should show that there had been a compliance with the contract on his part. The complaint avers that the amount due appellee is \$238.91, and asks judgment for that amount. The jury returned a verdict for \$258.08.

There is evidence in the record to authorize the jury to find that appellant was indebted to appellee, for work and labor, a certain sum, which, with interest to the date of the verdict, is the amount allowed by them. It has been held that in such a case the demand made in the pleading will be deemed to have been amended to meet the amount of damages proved and found in favor of the appellee. *City of Decatur v. Grand Rapids, etc., R. Co.*, 146 Ind. 577; *Kettry v. Thumma*, 9 Ind. App. 498; *White v. Stellwagon*, 54 Ind. 186; *Webb v. Thompson*, 23 Ind. 428. In the case at bar this question is sought to be raised as a cause for a new trial, and it has been held that the mere fact that the verdict is for an amount in excess of that asked in the complaint can not be assigned as a cause for a new trial, in any form, in case the facts stated and the evidence entitle the party to recover the amount found. *McKinney v. State, ex rel.*, 117 Ind. 26.

Appellant's counsel argue that the verdict is not sustained by sufficient evidence. The evidence is conflicting, but as there is evidence to authorize the verdict returned we can not disturb the conclusion reached by the jury.

Judgment affirmed.

HALSTEAD v. COEN, ADMINISTRATRIX, ET AL.

[No. 4,460. Filed June 18, 1903.]

WILLS.—Construction. — Vested Estates. — Restraint Upon Alienation.—

Where a testator provided in his will that his real estate should be preserved unsold until his youngest child should arrive at the age of twenty-one years and until the end of that period neither of his devisees should have any power to convey any portion thereof, and that the fee in the land was not conveyed by such will so as to vest the title in the devisees named until the youngest child should arrive at the age of twenty-one years, and at such time two-thirds in value thereof should pass in fee to his children named, share and share alike, and one-third to his wife, during her natural life, and at her death to be partitioned among his children in the same manner as the two-thirds thereof, the fee in the lands, subject to the life estate of the widow, vested in the children at the death of testator, the limiting words constituting a restraint upon its alienation or partition until the youngest living devisee reached the age of twenty-one years. *pp. 303-305.*

PLEADING.—Parties.—Demurrer.—A complaint, to withstand a demurrer for want of sufficient facts, must state a good cause of action in favor of all the plaintiffs who have joined in bringing the action. *p. 305.*

PARTIES.—Life Estates.—Landlord and Tenant.—Action for Waste.—

Testator by the terms of his will gave two-thirds of his lands to his children and one-third to his wife, during her life, and directed that no estate vest until his youngest child should arrive at twenty-one years of age and no partition should be made thereof until such time, giving his executor authority to lease the lands and collect the rents. *Held*, that the widow as administratrix with the will annexed, and as a devisee under the will, and the children of testator as devisees, were proper parties plaintiff in an action against the lessee of the lands for damages to the land and to enjoin the lessee from cutting and selling timber from the land. *pp. 303-307.*

EVIDENCE.—Compromise and Settlement.—Landlord and Tenant.—A letter written by defendant to plaintiff with a view of settling the controversy between them in regard to the removal of timber from land held by defendant under a lease, that the matter could be fixed up, and that as soon as defendant could procure an itemized list of the wood sold he would show same to plaintiff and pay over all of the money received for the wood, was improperly admitted in evidence in an action by lessor against the lessee for waste. *pp. 307, 308.*

Halstead v. Coen.

From Jasper Circuit Court; *J. S. Lairy*, Special Judge.

Action by Clara Coen, administratrix of the estate of Madison Makeever, deceased, and others, against Everett Halstead. From a judgment for plaintiffs, defendant appeals. *Reversed.*

Frank Foltz, C. G. Spitler, H. R. Kurrie, C. W. Hanley and J. J. Hunt, for appellant.

E. P. Honan, B. F. Ferguson and J. E. Wilson, for appellees.

ROBINSON, C. J.—Madison Makeever died the owner of certain lands and by his will made the following provisions: "Item 1. I direct that all my real estate shall be preserved unsold until my youngest child shall arrive at the age of twenty-one years, and until the end of that period neither of my devisees hereinafter named shall have any power or authority to convey any portion of said real estate, with the privilege of partition. The fee in said land is not conveyed by this will so as to vest the title in the devisees until the youngest living devisee named herein shall have arrived at the age of twenty-one years. Item 2. I further direct that when the youngest legatee hereinafter named shall arrive at the age of twenty-one years the real estate owned by me at the time of my death shall be partitioned as follows: Two-thirds in value shall pass in fee to my children hereinafter named in item three of said will and their descendants. Each of said children in person or by their children shall share and share alike in such division of the two-thirds of such real estate. The one-third in value of such real estate as I may own at my death, when the youngest legatee named in this will shall have arrived at the age of twenty-one years, shall vest in my wife, Clara Makeever, during her natural life, and at her death the same shall be partitioned in the same manner as provided for the two-thirds aforesaid. Item 3. The rents and profits of the real estate derived in items one and two of this will

shall be collected and divided by my executor hereinafter named as follows: Each year from the time of my death until the youngest living devisee named herein shall have arrived at the age of twenty-one years. Said executor shall pay to my wife, Clara Makeever, two-fifths thereof and the remaining three-fifths to be divided equally between my following named children," etc. The remaining part of the will contains certain bequests of personalty, gives directions to the executor as to the disposition to be made of the personal property, and authorizes him "to take possession and rent the real estate of which I may die possessed."

Clara Coen, as administratrix with the will annexed, leased the lands of which the testator died seized to appellant, who entered into possession. The lease provided, among other things, that the lessee would not cut, injure, or remove, nor permit to be cut, injured, or removed, any tree, timber, or wood whatever, existing on the leased land, without the written order of the lessor, and that he would protect the same from trespass, and as far as within his knowledge inform the lessor immediately of all such acts. Appellant having cut, as alleged, and appropriated to his own use a quantity of the growing timber consisting of cordwood, posts and sawlogs, this suit was brought by Clara Coen, administratrix, the children of the testator, and Clara Coen as a devisee under the will, for damages, and for an injunction to restrain appellant, whom it is averred is insolvent, from further cutting and selling the timber. The amended complaint is in one paragraph. Copies of the lease and of the will of Madison Makeever are filed with and made part of the complaint.

Under the rule that the law will construe the terms of a will as creating a vested estate, if possible (*Amos v. Amos*, 117 Ind. 37; *Davidson v. Bates*, 111 Ind. 391; *Davidson v. Koehler*, 76 Ind. 398; *Harris v. Carpenter*, 109 Ind. 540; *Heilman v. Heilman*, 129 Ind. 59), the will in ques-

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tion vests the fee in the lands in the children subject to a life estate in one-third in the widow. While the testator does say that the fee is not conveyed by the will so as to vest the title in the devisees until the youngest living devisee is twenty-one years of age, yet, from the whole instrument, it was manifestly the intention of the testator to prevent the disposition or partition of the lands until the time mentioned. Until that time, he expressly provided the manner in which the rents and profits should be paid to the devisees named in the will. Evidently it was his intention to have the land kept in one body until that time, and the limiting words used should be construed as a restraint upon its alienation or partition until the youngest living devisee reached the age of twenty-one years.

The action is brought by Clara Coen as a devisee under the will, by Clara Coen as administratrix with the will annexed, and the children of the testator as devisees under the will. It is first argued that the demurrer to the complaint should have been sustained because the pleading does not state a cause of action either in Clara Coen in her individual capacity or in her as administratrix. It is well settled that, under a demurrer stating for cause the want of sufficient facts, a party may take advantage of want of sufficient facts as to any one of the plaintiffs. To withstand a demurrer the complaint must state a good cause of action in favor of all the plaintiffs who have joined in bringing the action. *Brown v. Critchell*, 110 Ind. 31; *Hyatt v. Cochran*, 85 Ind. 231; *Holzman v. Hibben*, 100 Ind. 338; *Berkshire v. Shultz*, 25 Ind. 523; *Louisville, etc., R. Co. v. Lohges*, 6 Ind. App. 288; *Steinke v. Bentley*, 6 Ind. App. 663.

The will vested a naked power in the executor, not coupled with an interest. The executor, the administrator with the will annexed, was given possession of the land for a time, with power to rent, and collect the rents and

profits, and distribute the same in a certain manner. Ordinarily an administrator has no rights, as such, in the land of his decedent, who has left heirs or devisees, except to subject the land to the payment of his decedent's debts. But in the case at bar the administratrix was carrying out the terms of the will. It is not questioned that she had the right, by the terms of the will, to make the lease. Having taken possession under the will, she was required to protect and care for the estate, and would necessarily have the right to exact of a lessee reasonable conditions in that regard. If she leased the land, and permitted her lessee to commit waste, she would be liable, for the same reasons that make a tenant for life or for years liable for waste, by whomsoever committed. See *Wood v. Griffin*, 46 N. H. 230; *Wade v. Malloy*, 16 Hun 226; *Porch v. Fries*, 18 N. J. Eq. 204; *Stetson v. Day*, 51 Me. 434; *Beers v. Beers*, 21 Mich. 464; *Cargill v. Sewall*, 19 Me. 288.

Moreover, the administratrix, with the power conferred by the will, occupies a position in the nature of a trustee. She is entitled to the possession of the lands, and authorized to collect the rents and profits, and, together with the beneficiaries named in the will, represents the whole estate in the lands. Although the estate she represents might not, as such, have any interest in the damages recovered, yet she has an interest in restraining the lessee from committing further waste by cutting the growing timber from the premises which the will placed in her possession. See *Lilly v. Dunn*, 96 Ind. 220, 224; *Rinker v. Bissell*, 90 Ind. 375; §§252, 263 Burns 1901; Perry, *Trusts* (4th ed.), §§873, 874, 881; Hill, *Trustees* (4th Am. ed.), *544, *545.

Clara Coen was properly joined as plaintiff in her own right. She has a life estate in the undivided one-third of the land. She is directly interested in preventing a deterioration of the estate. She, having an undivided interest in the whole estate, has a more or less valuable individual

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interest as the value of the whole estate is increased or diminished. Under the facts averred, she is a proper party plaintiff in an action to prevent further waste. The demurrer to the complaint for want of sufficient facts was properly overruled.

The court submitted certain questions of fact to a jury, but afterwards made a special finding of the facts, with conclusions of law, upon which the judgment and decree are based. The court, as it might do, disregarded some of the jury's findings. In such cases, even if the jury had been misled by certain evidence introduced over appellant's objection, the error, if any, would not be prejudicial to appellant.

There is evidence that the parties had some negotiations with a view of settling the matter in controversy, and that afterwards appellant addressed a letter to appellee Coen, stating: "I am certain we can fix up the wood deal satisfactory. What I am waiting on is this: I must see the man that bought the posts in Goodland, and all parties that purchased wood of me, and get a correct itemized list of all. I am willing to show you everything complete, and give you all the money I received for the wood and receive no pay for my time. The facts are that I never received very much for the wood." This letter was manifestly written for the purpose of bringing about an adjustment of the differences between the parties and avoid litigation. It contains no admission of any independent fact, but if what it contains about a settlement of matters in controversy between the parties be eliminated there is nothing left. "An offer, concession, or admission," said the court in *Wilt v. Bird*, 7 Blackf. 258, "made in the course of an ineffectual treaty of compromise, and constituting, in itself, the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it; but the law is otherwise with regard to an independent fact admitted to be true, but not con-

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stituting such yielded point." It was error to admit this letter in evidence. See *Cates v. Kellogg*, 9 Ind. 506; *Binford v. Young*, 115 Ind. 174; *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378, 7 Am. St. 432; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *Dailey v. Coons*, 64 Ind. 545.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY
COMPANY ET AL. v. MARTIN, ADMINISTRATRIX.

[No. 4,026. Filed December 10, 1902. Rehearing denied April 7, 1903. Transfer denied June 19, 1903.]

PLEADING.—Proof.—Negligence.—Joint Action.—Variance.—Plaintiff alleging joint negligence in an action against a railroad company and a stone company is not bound to proof of joint management, the right of recovery in such case being regulated by the proof, and not by allegations of the complaint. *p. 313.*

NEGLIGENCE.—Railroads.—Jumping Off Car to Avoid Apprehended Danger.—Sudden Peril.—Contributory Negligence.—Decedent was scabbling stone on a car standing on a side-track on a down grade. The car was struck by a cut of cars and started down the incline, and decedent jumped and fell upon loose spalls, or stones, and slid down under the wheels of the car and was killed. The other employes jumped in the other direction and were not injured. It appeared that no injury would have happened if decedent had remained on the car, and that the rate of speed at which the train was moving was not so great as to preclude him from alighting safely had he jumped in the opposite direction. *Held*, the finding of the jury that decedent was free from contributory fault was not erroneous. *p. 313.*

MASTER AND SERVANT.—Assumption of Risk.—Decedent was directed to work at scabbling stone on a car standing on a side-track on an incline, and, in making up a train, the car was started down the track, and decedent jumped and was killed. It appeared that the wheels of the car were not blocked as they should have been when left standing in such position. *Held*, that the duty of decedent was a question of fact, and it can not be declared as a matter of law that it was his duty to examine the wheels and ascertain whether they were properly blocked. *p. 314.*

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MASTER AND SERVANT.—*Assumption of Risk.*—*Knowledge.*—Mere knowledge of the existence of the risk does not in all cases raise the presumption that the servant has agreed to assume it. *p. 314.*

NEGLIGENCE.—*Proximate Cause.*—*When Question for Jury.*—Where the facts are undisputed and but one conclusion can reasonably be drawn, their effect is to be determined as a matter of law by the court in the same manner as other issues between the parties; but where the inferential facts to be drawn from the main facts are in dispute, and there is room for different inferences among reasonable men, the question of proximate cause is for the determination of the jury. *pp. 315, 316.*

SAME.—*Proximate Cause.*—To justify the court in setting aside a verdict for plaintiff on the ground that defendant's negligence was not the proximate cause of the injury, the absence of connection must be substantial, not merely fanciful. *p. 316.*

SAME.—*Proximate Cause.*—*Nearness in Point of Time.*—*Other Causes Operating Conjointly.*—The fact that a negligent act was nearest in point of time does not of necessity make it the efficient cause of the accident, nor is it a defense that some other cause operated conjointly with the negligent act complained of. *p. 317.*

SAME.—*Licensee.*—Plaintiff's decedent who was employed by a stone company to dress stone while working on stone loaded on cars standing on a descending side-track was killed by the car starting down the incline. The only act of negligence proved against the railroad company was its failure to chock or block the wheels of the car. Decedent was not in the employ of the railroad company, and the railroad company had no interest in the stone quarry. *Held*, that decedent was a mere licensee of the railroad company and that defendant railroad company was not liable in damages for the injury resulting in his death. *pp. 319, 320.*

From Greene Circuit Court; *W. W. Moffett*, Judge.

Action by Marilda Martin, administratrix of the estate of John R. Martin, deceased, against the Chicago, Indianapolis & Louisville Railway Company and the Perry-Mathews-Buskirk Stone Company. From a judgment for plaintiff, defendants appeal. *Reversed as to the railroad company and affirmed as to the stone company.*

E. C. Field, W. S. Kinnan, W. V. Moffett, H. R. Kurrie, H. C. Duncan, I. C. Batman, C. E. Davis and E. E. Stevenson, for appellants.

S. B. Lowe, J. R. East and R. H. East, for appellee.

ROBY, C. J.—Marilda Martin, administratrix of the estate of John R. Martin, deceased, filed her complaint in the Greene Circuit Court against the Chicago, Indianapolis & Louisville Railway Company and the Perry-Mathews-Buskirk Stone Company, averring therein that her decedent's death was caused by the negligence of the defendants, whereby his next of kin were damaged in the sum of \$10,000, for which she asked judgment. A general verdict was returned against both defendants for \$4,000, together with answers to interrogatories. A motion for judgment notwithstanding the general verdict and for a new trial was made by each defendant and overruled by the court. Judgment was rendered upon the general verdict, from which this appeal is taken, and errors separately assigned calling in question the action of the court in ruling upon said motions.

The jury were carefully instructed upon the theory that the duty of the appellant stone company toward decedent was that of a master to its servant, and that the duty of the appellant railway company toward him was to exercise due care in view of the known conditions. The evidence establishes without conflict that the appellant stone company at the time of decedent's death was operating a stone quarry; that he was in its employment, being engaged in scabbling stone (trimming rough blocks of stone with a pick, or chisel, preparatory to finer dressing). He was under no contract relation with the appellant railway company, and it had no interest in the stone quarry or its operation; its connection therewith being confined to the transportation, as a common carrier, of stone from the quarry to various points, as directed by the stone company. It owned and operated certain switch tracks in the quarry, connected with its main line of railroad by a main switch, which was about three-quarters of a mile long. It operated trains to and from its main line, employing its own men and having exclusive control over them. On the morning

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of the accident the employes of the railway company had taken out two cuts of four cars each from the switch tracks, and placed them, coupled together, temporarily on the main switch track, for the purpose of making up a train for out shipment. The main switch on which they were placed stood on a steep down grade. The eight cars thus placed were equipped with good brakes which were firmly set by the employes of the railway company when the cars were placed on the track. These employes, or trainmen, then ran their locomotive from the main switch track to one of the other side-tracks, gathered up a cut of four more cars, and backed them down to the main switch, to be coupled to the eight already standing there. The locomotive was moved down, to make this last coupling, at an estimated speed of one and one-quarter miles per hour, and as it approached the eight cars already on the main switch the bell thereon was rung. Further notice of its approach was given by calling "Heads up," which was a term used to convey warning of its approach. The cars between which the coupling was attempted were new cars, equipped with "Trojan couplers," such as are in general use. The couplers were in good repair, and were properly adjusted by the brakeman. Had the coupling been made, there would have been no danger of the cars moving down the steep grade. The coupling, for some reason not shown, failed to make, and the eight cars ran down the grade; starting very slowly, but moving constantly with accelerated speed. It is shown that a number of men, including decedent, employed by the stone company, had come over from other tracks where they had been scabbling stone, in order to finish some uncompleted scabbling on the stone loaded upon these cars. They did so in obedience to the order of the foreman under whom they were working. The scabbling was largely done after the stone had been placed on the cars. Certain side-tracks were known as "hold-overs," and the work was ordinarily done while the cars were standing on them; they having

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been covered to protect the men from the weather while so engaged. The stone company had been in the habit theretofore of sending men out to the cars standing on the main switch to complete the scabbling of stone while the cars were temporarily standing there. Decedent had worked on one of these tracks until his car was transferred to the main switch as aforesaid, when he walked across the intervening space, and resumed work on the south side of the car standing on the main switch. Near where he was thus engaged an embankment of loose spalls, six or eight feet high, had been placed in proximity to the track. On the opposite side there was nothing to prevent decedent from safely alighting from the car. Farther on, piles of grout stone had been made on both sides of the track, barely leaving room for the cars to pass between them, and extending thirty feet above it. The train was being made up, and the car upon which decedent was working was taken from the hold-over track at the instance of the stone company. It was responsible for the condition of the embankment and the yard. The coming together of the cars set the eight cars in motion, and the decedent jumped off on the south side. When he struck the loose spalls, he slid down so that the wheels of the moving cars ran over and killed him. The other men alighted on the north side without injury. Decedent was working on the second car from the point of coupling, with his face to the engine. The stone upon which he was working was a large one, higher than his head. The wheels of the cars were not blocked. Cars not equipped with good brakes, when left upon the main switch, needed to be blocked; otherwise, blocking them tended to interfere with the work of the railroad company, by causing the wheels to leave the track when the train moved back. In the absence of such blocking the jury were authorized to find, as the general verdict does find, that the place was not reasonably safe for the use to which it was put by the stone company.

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It is earnestly insisted that the appellee, having alleged joint negligence, can only recover upon proof of joint management and control by appellants of the cars and quarry. The general proposition is that a party must recover according to the allegations of his complaint, or not at all, but under our statute it is not material whether a joint or several liability is alleged. The right of recovery in this respect being regulated by proof, and not by allegations of the complaint. *Louisville, etc., R. Co. v. Treadway*, 143 Ind. 689.

Whether decedent was guilty of negligence in leaping as he did depended upon the circumstances in view of which he acted. It does not appear that any injury would have been suffered had he remained upon the car. It is in evidence that the scabbling boss joined with others in calling to the men: "The cars are running away. Everybody off." It is also shown that the men all did leave safely, except the decedent, who was thrown upon the track by the loose spalls accumulated in the yard. The rate of speed at which the train was moving was not so great as to preclude him from alighting safely, and while he might have crossed the car and found secure footing on the north side of the track, yet, his failure so to do is not to be viewed from the standpoint of a disinterested critic after the event, but from the standpoint then occupied by him. So viewed, the verdict finding him free from contributory fault can not be said to be unsupported by the evidence. The legal proposition involved is not in doubt. "The inquiry in such a case always is, did the negligence of the defendant put the injured person to the choice of adopting the alternative of an attempt to escape, or to remain under an apparently well grounded apprehension of serious personal injury? Did he act with ordinary prudence, considering all the circumstances which surrounded him, or was his injury the result of rash apprehension of danger which

did not exist?" *Woolery v. Louisville, etc., R. Co.*, 107 Ind. 381, 387, 57 Am. Rep. 114.

It is further contended that the conditions making the place where decedent was directed to work dangerous were open and obvious, and therefore assumed by him. The master's duty is to use reasonable care to provide the servant with a reasonably safe place in which to work. The servant has the right to assume that such duty has been discharged. He can not, of course, act upon such assumption as against the evidence of his own senses. Whether decedent knew or ought to have known the danger to which he was subjected was a question of fact. Whether the absence of and the necessity for blocking under the wheels was or should have been known to him was also a question of fact. The exigency which required work to be done on cars while being made into a train would not seem to contemplate that each individual employe should take time to examine all the wheels of the eight cars, to ascertain if a sufficient number of them were properly blocked, or to inspect the brakes thereon; and it can not be said, as a matter of law, that the decedent might not properly rely upon the master having discharged his duty in regard to them. Mere knowledge of the existence of the risk does not in all cases raise the presumption that the servant has agreed to assume it. *City of Ft. Wayne v. Christie*, 156 Ind. 172; *Consolidated Stone Co. v. Summit*, 152 Ind. 297.

The decedent was ordered to work under circumstances involving a risk not contemplated by his employment. He received no warning from the master of increased danger. The descending grade and the general conditions existing were open to observation. To make the place safe, it was necessary that the wheels of the cars be blocked. Whether this had been done, or not, was not a fact necessarily within the equal knowledge of the decedent and his employer. *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 337. The question is not one as to the negligent use of appliances.

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The stone company put its men at work scabbling stone upon a platform. It was under obligation, therefore, to use reasonable care to make the platform reasonably safe for that use. The freight-car was not an appliance of the stone business. It was used as a platform or place upon which to work. The duty of the master with regard to it was no different from what it would have been had the platform not been upon wheels at all. The only difference was in the measures necessary to make the place reasonably safe.

Counsel for the stone company argue that the decedent's death was not the result of any act or omission on its part, but that the railway company, an independent intervening agency, put the cars in motion by attempting to couple to them additional cars, and thereby became the responsible cause of the accident. The doctrine of proximate cause is not in itself involved in obscurity. "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it." *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Chicago, etc., R. Co. v. Fenn*, 3 Ind. App. 250, 257; *Ohio, etc., R. Co. v. Trobridge*, 126 Ind. 391; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 36 L. R. A. 535; *Louisville, etc., R. Co. v. Ousler*, 15 Ind. App. 232, 235; *Union Pac. R. Co. v. Callaghan*, 56 Fed. 988, 6 C. C. A. 205; *Stark v. Lancaster*, 57 N. H. 88; *New York, etc., Ex. Co. v. Traders, etc., Ins. Co.*, 132 Mass. 77, 42 Am. Rep. 440.

Where facts are undisputed and but one conclusion can reasonably be drawn, their effect is to be determined, as matter of law, by the court, as in regard to other issues between parties. The finding of fact, to be complete, as contemplated by the foregoing proposition, includes such inference of fact as may be drawn from the main facts proved; the existence of such inferential fact, and not the

existence of the main facts, being in dispute, and there being room for different inferences among reasonable men, the question is for the jury. *Baltimore, etc., R. Co. v. Walborn*, 127 Ind. 142, 149; *Railroad Co. v. Stout*, 84 U. S. 657, 21 L. Ed. 745; *Pittsburgh, etc., R. Co. v. Bennett*, 9 Ind. App. 92, 113; *Louisville, etc., R. Co. v. Williams*, 20 Ind. App. 576; *Richmond, etc., R. Co. v. Powers*, 149 U. S. 443, 37 L. Ed. 642, 13 Sup. Ct. 748; *Cincinnati, etc., R. Co. v. Grames*, 136 Ind. 39.

The general verdict finds, among other things, that the negligence of the stone company, as averred, was the proximate cause of the death. If such inference is one that can not be deduced from the circumstances and facts of the occurrence as proved, then the motion for a new trial by the stone company should have been sustained; but the absence of connection must be substantial, and not merely fanciful. "The law is a practical science, and repudiates subtle refinements and speculative inquiries. It will not sacrifice substantial rights to such impracticable processes, but will reject them to make way for practical justice. Recondite discussions of efficient cause, plurality of causes, and kindred topics, are for the metaphysician and the speculative philosopher, not the practical lawyer or judge." *Louisville, etc., R. Co. v. Nitsche*, 126 Ind. 229, 235, 9 L. R. A. 750, 22 Am. St. 582. "The doctrine of contributory causes produces annually a crop of disputations, which savor more of the subtleties and learning of the schoolmen than of a desire to evolve any practical, intelligible rule which shall be of service in administering justice between party and party. * * * If it ever happens that logic and common sense can not be reconciled in the application of this doctrine to the decision of causes, logic must give way." *Willey v. Inhabitants of Belfast*, 61 Me. 569, 575.

If the appellant stone company was negligent in directing decedent to work upon the car while it was standing

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upon the main switch, such negligence had its inception in the then existing conditions. The descending track was one of those conditions. The absence of blocking under the wheels of the cars was another. The fact that a train was being made up for out shipment, and that cars attached to the engine were or would be pushed against and coupled to those upon which decedent was working, were other conditions in the light of which the act of the stone company must be judged. It not only knew that the eight cars would be disturbed, but whatever was done with them was done in accomplishing the shipment of the stone at its direction and for its benefit. It can not therefore be said that the act of the railway company was wholly disconnected from the original fault of the stone company in ordering decedent to work in a place of danger; its act being one of the things which went to make up the danger. *Lane v. Atlantic Works*, 111 Mass. 136, 140. "The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self operating, which produced the injury." *Milwaukee, etc., R. Co. v. Kellogg, supra*; *The G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 236, 238; *Insurance Co. v. Boon*, 95 U. S. 117, 131, 24 L. Ed. 395. That the act of the railway company was nearest in point of time does not of necessity make it the efficient cause of the accident. *Alexandria Mining, etc., Co. v. Irish*, 16 Ind. App. 534, 546; *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 39 Am. St. 251. Nor is it a defense that some other cause operated conjointly with the negligent act complained of. *Union Pac. R. Co. v. Callaghan*, 56 Fed. 988, 6 C. C. A. 205; *Knouff v. City of Logansport*, 26 Ind. App. 202.

The reasoning of the court in the last case cited is directly in point. The position of the railway company is not identical with that of the stone company. The duty of the latter to decedent arose by implication of law from the relation of employer and employe existing between

existence of the main facts, being in fact to the de-
 being room for different inference was scabbling
 men, the question is for the conditions here-
R. Co. v. Walborn, 127 Ind. 115, 116; *the railway com-
 v. Stout*, 84 U. S. 65; *for his safety while
 etc., R. Co. v. Ben* the breach of such duty.
ville, etc., R. Co. v. Benhart, 115 Ind. 399, 412; *Ev-
 mond, etc., R. Co. v. Griffin*, 100 Ind. 221-223, 50 Am.
 642, 13 Sup. Ct. 136; *Railroad Co.*, 102 U. S. 577, 26 L.
 136 Ind. 136.

The duty to make the owner or occupant liable for an
 neighbor is not required by one passing over his premises, some-
 more than a mere passive acquiescence in the use
 of his land by others is necessary. So long as his lands
 are used by others, be it never so frequent, for their own
 convenience, he is not liable. * * * The inducement
 must be equivalent to an invitation, either express or im-
 plied; mere permission is not sufficient." *Evansville, etc.,
 R. Co. v. Griffin, supra; Faris v. Hoberg*, 134 Ind. 269,
 276, 39 Am. St. 261; *Woodruff v. Bowen*, 136 Ind. 431,
 22 L. R. A. 198. The owner owes the licensee the duty
 of abstaining from any positive wrongful act that may re-
 sult in his injury, but the licensee takes his own risk as
 to the safe condition of the premises upon which he enters.
Woodruff v. Bowen, supra; Beehler v. Daniels, etc., Co.,
 18 R. I. 563, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. 790;
Thiele v. McManus, 3 Ind. App. 132.

In determining whether the circumstances are sufficient
 to imply an invitation, in the technical sense of the term,
 the "principle appears to be that invitation is inferred
 where there is a common interest or mutual advantage,
 while a license is inferred where the object is the mere
 pleasure or benefit of the person using it." *Bennett v.
 Railroad Co., supra; Campbell, Negligence*, §33; *Dowd v.
 Chicago, etc., R. Co.*, 84 Wis. 105, 54 N. W. 24, 36 Am.
 St. 917, 20 L. R. A. 527, 531. This seems to have been
 the ground for the decision in *John Spry Lumber Co. v.*

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Wiggan, 182 Ill. 218, 54 N. E. 1002, 6 Am. Neg. Rep. —a case much relied upon by appellee. Its facts were lumber belonging to the defendant was being piled by the defendant's yardmen on a dock after being handed to them by the vessel by another set of men in the employment of an independent contractor to whom the defendant had let the job of unloading. One of these men was injured by the falling of a pile of timber while he was going from the vessel to a water-closet upon the dock for the use of the men there. Upon these facts the court held that the person injured was on the premises of the defendant by invitation, and not as a mere licensee. The work of the defendant in unloading its lumber was being done by the person injured, and his presence on the dock was due to that fact.

The decedent at the time of his injury was not doing any work for the railway company, or in which it had any interest by contract or otherwise. It follows that the mere knowledge of the railway company that the employees of the stone company went upon these cars after they had been billed out for the purpose of completing the scabbling of stone thereon, in the absence of any interest in such work, while sufficient to prevent them being treated as trespassers, did not amount to an invitation, but was at the most a license. Therefore, for active misconduct, if any, it must answer, but no duty upon its part arose to block the cars to make them safe for the use of the stone company and its employees in scabbling stone. *O'Leary v. Erie R. Co.*, 64 N. Y. Supp. 511.

The negligent acts charged against the railway company may be classified as follows: (1) Failing to keep chocks or blocks under the wheels of the eight cars, as by duty and custom required; (2) insufficient brakes upon said cars, with insufficient power and leverage; (3) setting said brakes loosely and in an insufficient manner; (4) causing other cars, heavily loaded, to be switched onto

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the main switch, and to run against those already there, with great and unnecessary force; (5) using coupling appliances rusted, rough, not having been oiled, out of gear, and not properly adjusted; (6) attempting to make couplings without giving any warning to decedent, or informing him that it was to be attempted. The custom relied upon in the first specification, if it were of controlling effect (*O'Leary v. Erie R. Co., supra*), was not proved; the evidence being that the railway company only blocked the wheels of the cars on the main switch when the brakes were insufficient and out of repair. The duty charged, as is heretofore stated, did not arise by operation of law. The remaining specifications of negligence, in so far as they charged active misconduct for which the railway company would be liable to one not a trespasser upon its car, are shown by the answers to interrogatories to be without foundation in fact. The motion of the appellant railway company for judgment notwithstanding the general verdict should have been sustained. Both motions made by the stone company were correctly disposed of.

The judgment against the appellant the Perry-Mathews-Buskirk Stone Company is in all things affirmed. The judgment against appellant Chicago, Indianapolis & Louisville Railway Company is reversed, and the cause remanded, with instructions to sustain its motion for judgment on the interrogatories and their answers, notwithstanding the general verdict.

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SPENCER v. SPENCER.

[No. 4,317. Filed June 23, 1903.]

JUDGMENT.—*Decree Terminating a Trust.—Collateral Attack.*—Where a court has decreed in a suit between the parties to a trust that the trust be closed and terminated in accordance with an agreement and settlement, a subsequent suit by one of the parties seeking to have so much of the decree vacated as declares the trust terminated, is a collateral attack. pp. 328, 329.

SAME.—*Collateral Attack.*—A judgment will not be set aside upon a collateral attack unless it is made to appear that the judgment was rendered by a court without jurisdiction, and is absolutely void. p. 329.

COURTS.—*Circuit Court.—Jurisdiction Over Controversy as to Trust Estate.*—A circuit court has jurisdiction in a suit to determine the effect of a will and declaration of trust, and the validity of an agreement between the parties in relation to the trust. p. 329.

SAME.—*Collateral Attack.*—A decree rendered by a court having jurisdiction both of the subject-matter and the parties can not be assailed collaterally. p. 330.

From White Circuit Court; *T. F. Palmer*, Judge.

Suit by Fred Spencer against Charles C. Spencer. From a judgment for defendant, plaintiff appeals. *Affirmed.*

A. W. Reynolds, A. K. Sills, G. C. Reynolds and J. R. Ward, for appellant.

B. K. Elliott, W. F. Elliott, F. L. Littleton and E. B. Sellers, for appellee.

ROBINSON, C. J.—Appellant's complaint avers: That on March 20, 1893, Calvin C. Spencer, father of appellant and appellee, made his last will by which he devised to appellee the southeast quarter and the northeast quarter of the southwest quarter of section thirteen in a certain township and range, which will was afterwards duly probated; that concurrently with the execution of the will the testator addressed to appellee an instrument in writing giving

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the substance of his will and stating: "Now I desire that you shall hold the following described property in trust for Fred, to wit [property above described]; you shall manage the property so held in trust and shall receive all rents, profits, and revenue from the same, and convert the same into money, at reasonable times, and after paying all necessary expenses, including taxes, on said trust property, you shall pay the balance of the money to Fred Spencer; you shall allow him the full privilege of living upon the said land; I also desire and intend that you shall hold the following described property in trust for Rae Spencer, to wit: The south half of the northeast quarter of section thirteen, also the south half of the northwest quarter of section thirteen, town twenty-six, range four west; you shall hold the property in trust for Rae in the same manner and with the same powers that you hold the property in trust for Fred, heretofore described. In case you survive either Fred or Rae, then, in that case, the property of the one you survive and of both if you survive both, so held in trust by you, shall become yours absolutely. You shall have power of control and disposition of said property. Now if you will accept the property herein mentioned on the terms above stated, and if you will carry out my wishes and intentions as herein expressed I shall let my will stand as I now have it;" that appellee agreed to carry out the request in the above instrument and declaration of trust; that on September 6, 1899, appellee brought suit against appellant; that appellant filed a cross-complaint against appellee, to which appellee filed an answer; that the following proceedings were had in that cause: "On the — day of —, 1900, at the April term, 1900, of said court, the following proceedings were had in said cause, to wit: Comes the defendant and cross-complainant in person, and Fred Spencer by his attorney, E. B. Sellers, the appearance of John R. Ward and Reynolds & Sills having been withdrawn, and on motion and application of said

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Fred Spencer that leave be granted him to withdraw his motion and affidavit heretofore, on the 17th day of May, 1900, made and filed herein for a change of venue of this cause from the county, and now, upon said application and motion, and by agreement of the parties hereto, leave is granted to withdraw said affidavit for change of venue, and the order changing the venue of said cause to Cass county, Indiana, is set aside. The defendant withdrew his demurrer to the complaint therein filed on the 6th day of September, 1899, and his motion filed therein on December 11, 1899, to require plaintiff to separate his causes of action, and also withdrew his demurrer, filed therein, to the answer of said Charles C. Spencer to the cross-complaint of said Fred Spencer, and the said Fred Spencer, appearing in person, filed his reply in the words and figures following, to wit [insert], to the several paragraphs of answer of the said Charles C. Spencer, as defendant, to said cross-complaint, and by agreement of parties thereto, each appearing in open court for himself, and the defendant Fred Spencer also by his attorney, E. B. Sellers, said cause was submitted to the court for trial, the issues being joined on the complaint of said Charles C. Spencer and the cross-complaint of said Fred Spencer, and the court, having heard the proof, and being sufficiently advised on the issues joined on plaintiff's complaint, and the answer thereto, and the issues joined on the cross-complaint, find, upon such proof and the agreement of parties thereto, that the allegations of plaintiff's complaint and the several paragraphs thereof were true; that the said Charles C. Spencer and Fred Spencer are sons of Calvin C. Spencer, who died testate on the 14th day of February, 1898, and his last will and testament was duly admitted to probate in this court on February 16, 1898, and recorded in will record four, pages 142 and 143, of the records of wills of White county; that on the day said will was executed by said testator he, by an instrument in writing, requested the said

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Charles C. Spencer to hold the following real estate in White county, Indiana, to wit: The southeast quarter and the northeast quarter of the southwest quarter of section thirteen, township twenty-six north, range four west, in trust for the use of Fred Spencer of the rents and profits, the fee simple title to the same to remain in said Charles C. Spencer; a sum equal to the net annual profit of said land to be paid to said Fred Spencer. And the court found that by said will the testator devised said real estate to said Charles C. Spencer, who agreed to carry out said request in said instrument and declaration of trust and has ever since the probate of said will faithfully discharged his duties as trustee under said trust. And the court found that, after the probate of said will, Margaret Rae Spencer, who afterward became, by marriage, Margaret Rae Rubright, began against the plaintiff and defendant to the cross-complaint, Charles C. Spencer and Fred Spencer, and others, a suit, which suit was commenced in this court, and proceeded to final judgment and decree establishing said will, and in said decree said trust was recognized as to Fred Spencer, and during the continuance of said trust relation the said Charles C. Spencer faithfully discharged said duties as such trustee, and fully accounted to said Fred Spencer in said trust. And the court further found that said trust and trust relation continued until March 28, 1899, when the said Charles C. Spencer and Fred Spencer entered into a written agreement, whereby a full settlement and accounting was had between them, and said Charles C. Spencer bought from said Fred Spencer his life interest in said lands, and paid him full value therefor, and the said Fred Spencer at the time conveyed said land to said Charles C. Spencer by deed, and conveyed thereby his life estate and all other and any interest he, the said Fred Spencer, had in said land, and fully and completely released said Charles C. Spencer from accounting further in said trust and for longer holding said land in trust, for which

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said Charles C. Spencer paid him full value therefor. And the court found that at the time the said agreement was entered into, March 28, 1899, said Charles C. Spencer fully informed said Fred Spencer as to his legal and other rights in and to said real estate under said will and declaration of trust, and also fully informed him, the said Fred Spencer, as to the value, nature, and character of the consideration to be paid, delivered, and conveyed to him for his said interest in said real estate, and at said time, to wit, and ever since the probate of said will Fred Spencer fully and well knew his rights and interest, and the value thereof under said will and declaration of trust, and during all of said time said Fred Spencer was, and is, of sound mind, and over twenty-one years old, and several years the senior of Charles C. Spencer, and capable of managing his own affairs.

“And the court found that said agreement and settlement was a fair one, and made in the interest of both parties thereto, and that the said Fred Spencer at the time fully understood the same, and the terms thereof, and has received the full consideration agreed to be given him. And the court found that, pursuant to said agreement and settlement, each party had received all the consideration provided for him thereunder, and that the property so received said Fred Spencer has enjoyed, possessed, and used as his own, absolutely, and said Charles C. Spencer has used and possessed as his own, freed from the trust, said real estate. And the court found that said agreement and settlement were valid, and that by and under the same there was a full settlement and adjustment of all differences, accounts, liabilities, and all other matters of every nature existing or claimed by either or both parties, and in all matters in which either have an interest, including all claims growing out of the estate of Calvin C. Spencer, or in any manner affecting the same, or the trust created by said Calvin C. Spencer in favor of said

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Fred Spencer. And the court found that by said settlement said Fred Spencer relinquished his right to enforce said trust, and to receive any of the proceeds of the sale of said real estate, and that said trust was ended, terminated, and closed, and said agreement and settlement should be confirmed. The court found that said Fred Spencer should take nothing in his cause of action sued on in his cross-complaint, and the court found that the said Charles C. Spencer was the owner in fee simple and in possession of said real estate, and that said Fred Spencer should be forever enjoined from setting up any interest in or to said real estate, and that the title thereto should be quieted in Charles C. Spencer, and all parties waive any exceptions or objections to the finding of the court. And the court ordered and decreed that the trust created, as heretofore found, for the use of said Fred Spencer, be closed and terminated according to said agreement and settlement of plaintiff and defendants and cross-complainant, Fred Spencer, above found to have been made, in which said agreement and settlement between the parties hereto is confirmed and approved, and said deed of said Fred Spencer executed to said Charles C. Spencer by him, pursuant to said agreement and settlement for the said real estate, to wit, the southeast quarter and the northeast quarter of the southwest quarter of section thirteen, township twenty-six north, range four west, in White county, Indiana, is hereby confirmed and approved, and declared to vest in said Charles C. Spencer the fee simple title to said real estate; that said Charles C. Spencer has fully accounted in said trust, and is discharged as such trustee, and said trust declared closed and annulled; that the said Fred Spencer take nothing by this action on his cross-complaint; that the plaintiff Charles C. Spencer is the owner in fee simple of the real estate above described, and that the claims of the said defendant and cross-complainant Fred Spencer are without right and unfounded, and the plaintiff's title thereto be, and the same is hereby,

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quieted; that the plaintiff have and recover of the defendant his costs laid out and expended herein, which are paid."

It is further averred that, ever since the above decree was entered, appellee maintains that the trust created by the will and the declaration of trust has been closed and terminated by reason of the decree, and not otherwise, and that appellant is not entitled to any of the rents and profits, and has no right to live on the land, and that appellee was discharged as such trustee. The complaint, after giving the pleader's construction of the will, avers that the design of the trust has not been accomplished; that appellee's acts were in contravention of the trust; that the deed of appellant to him, and the suit instituted in which the decree was rendered, was an attempt to defeat the object of the trust—and asks that so much of the decree as declares that the trust was terminated be annulled and vacated, that the trust be declared in force, and that appellant's interest in the trust property be held in trust for him by appellee, or that a receiver be appointed for that purpose.

The error assigned rests upon the court's ruling sustaining a demurrer to the complaint.

The statute makes the following provisions: "No person beneficially interested in a trust for the receipt of the rents and profits of lands can dispose of such interest unless the right to make disposition thereof be conferred by the instrument creating such trust; but the interest of every person for whose benefit a trust for the payment of a sum in gross is created is assignable." §3394 Burns 1901. "Every sale, conveyance, or other act of a trustee, in contravention of a trust, shall be void." §3395 Burns 1901. "Every power, beneficial or in trust, shall be irrevocable, unless an authority to revoke it is reserved in the instrument creating the same." §3407 Burns 1901. Section 3411 Burns 1901 provides that real estate subject to a trust may be ordered sold by the court upon the complaint of "the trustee or *cestui que trust* of any trust," setting forth either

that the land is liable to waste or depreciate in value, or that taxes and repairs exceed the income and are liable to defeat the intention of the person creating the trust, or that the sale of the property and the safe and proper investment of the proceeds would inure to the advantage and benefit of the *cestui que trust* and fulfill the purposes of the trust. Section 3419 Burns 1901 provides that such trustee and the funds in his hands shall be at all times under the equitable control of the court having jurisdiction thereof for the preservation of the funds and carrying out the purposes of the trust.

The argument of appellant's counsel goes to the proposition that the will and declaration of trust created a trust estate, which could not be terminated by an agreement between the trustee and the beneficiary, and that the former judgment terminating the trust was without jurisdiction, and therefore void, and, being void, may be at any time vacated or set aside.

It is first argued by counsel for appellee that the court rendering the former judgment was a court of general superior jurisdiction and that, as it had jurisdiction of the subject-matter of that suit and of the parties, its judgment, even if erroneous, can not be successfully assailed in a collateral proceeding.

We think it clear that the present action is a collateral attack upon the former judgment. Any judicial proceeding, the object of which is to avoid, defeat, evade, or deny the force and effect of a judgment or decree, is either a direct or a collateral attack upon the judgment or decree. Various provisions are made by statute for avoiding or correcting judgments, and, when one of these statutory methods is pursued, the attack upon the judgment is direct; but if the same result is sought to be reached in some manner not provided by law, the attack is collateral. "Any proceeding," says the author in VanFleet's Collateral Attack, §5, "provided by the law for the purpose of avoiding or correcting a

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judgment, is a direct attack which will be successful upon showing the error; while an attempt to do the same thing in any other proceeding is a collateral attack, which will be successful only upon showing a want of power." See, also, *Harman v. Moore*, 112 Ind. 221; *Lewis v. Rowland*, 131 Ind. 103; *Exchange Bank v. Ault*, 102 Ind. 322. The present action is not an attempt to avoid or correct the former judgment in some manner provided by law, but is an effort to obtain another and independent judgment which will destroy the effect of the former judgment. As the present action is a collateral attack upon the former judgment, it must be made to appear that the judgment was rendered without jurisdiction and is absolutely void. *Winslow v. Green*, 155 Ind. 368; *Cohee v. Baer*, 134 Ind. 375, 39 Am. St. 270; *Davis v. Clements*, 148 Ind. 605, 62 Am. St. 539.

Jurisdiction is the power to hear and determine a cause. And it must be conceded that the circuit court rendering the former judgment had jurisdiction over the subject-matter of trust estates. The subject of the controversy in that action was the effect of the will and declaration of trust, and the validity of the agreement of the parties in relation to the trust. The court in that case had necessarily to determine whether the relation created between the parties was of such a character, the termination of which was inhibited by the statute. It had necessarily to determine the effect of all the provisions of the will and declaration of trust—among others, that the trustee should receive the rents and profits from the land, and convert the same into money, and after paying all necessary expenses he should pay the balance of the money to the *cestui que trust*; that in case the trustee survived, the property was to be his absolutely; and that he should have power of control and disposition of the property. It had necessarily to determine the character of the relation created by the will and declaration of trust, and in doing so must necessarily place a con-

struction upon those instruments. It unquestionably had the power, without usurping an unconferred jurisdiction, to decide these matters, and this power to decide them included the power to decide wrong as well as right. *Ely v. Board, etc.*, 112 Ind. 361; *Snelson v. State, ex rel.*, 16 Ind. 29. As stated by the court in *Coleman v. Floyd*, 131 Ind. 330: "An error may be committed in construing or applying a statute, no matter how clear or imperative its terms, as well as in any other ruling. If the concession be made that there was a clear and flagrant misconstruction or misapplication of the statute, still the only conclusion warranted by such a concession is that there was an erroneous ruling or decision." See *Maynard v. Waidlich*, 156 Ind. 562; *Craighead v. Dalton*, 105 Ind. 72; *Board, etc., v. Platt*, 79 Fed. 567, 25 C. C. A. 87.

As it does not appear on the face of the prior judgment that it is void, it is not subject to a collateral attack. *Lantz v. Maffett*, 102 Ind. 23; *State, ex rel., v. Morris*, 103 Ind. 161; *Young v. Sellers*, 106 Ind. 101; *Hall v. Durham*, 109 Ind. 344; *Lewis v. Rowland*, 131 Ind. 103. The most that could be said is that the prior judgment was erroneous, and, however erroneous it might be, it is not subject to a collateral attack. The pleadings in the former action were set out in the complaint in this action, and show that the whole subject-matter was covered in the complaint of the present appellee, the cross-complaint of appellant, and the answer thereto by appellee, and the decree covers the matters there put in issue. The present action seeks to avoid and annul the precise question adjudicated by that decree. The whole force and effect of the decree is assailed. As the court had jurisdiction both of the subject-matter and of the parties, the decree rendered can not be thus assailed collaterally. From the earliest judicial history of the State, it has been held that, where a court has jurisdiction, a final determination of the matter by the court forever puts it at rest. See *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec.

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251; *Walker v. Walker*, 150 Ind. 317, and cases cited; *Beaver v. Irwin*, 6 Ind. App. 285; *Steves v. Frazee*, 19 Ind. App. 284; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. 881.

Judgment affirmed.

McCoy v. BOARD OF TRUSTEES OF THE TOWN OF CLOVERDALE.

[No. 4,442. Filed June 23, 1903.]

MUNICIPAL CORPORATIONS. — *Annexation*. — *Appearance*. — *Notice*. —

Where a property owner entered an appearance to a proceeding to annex territory to a town and filed a motion involving the merits of the proceeding, the appearance, notwithstanding the statement in the motion that it was special, was a general one, and amounted to a waiver of alleged defects in the notice. *p. 332.*

SAME.—*Annexation*.—*Amendment of Petition*.—No error was committed by the circuit court in an annexation proceeding in permitting an amendment of the petition to be made by omitting therefrom part of the lands originally included therein. *p. 333.*

SAME.—*Annexation*.—*Petition*.—A petition for the annexation of adjoining lands to a town alleging that the persons residing in the territory sought to be annexed have all the advantages of the town and its institutions including public school privileges, police and fire protection; that the territory sought to be annexed is contiguous to the town; that there is no public way for ingress to or egress therefrom except over and along the streets of the town, which have been improved by the town at great expense, is sufficient. *p. 333.*

SAME.—*Petition*.—*Description of Property Sought to be Annexed*.—A petition for the annexation of contiguous territory to a town is not bad for failure to contain a description of the territory sought to be annexed, where an exhibit filed with the petition contained a description of the property. *pp. 333, 334.*

SAME.—*Annexation*.—*Evidence*.—Evidence in an annexation proceeding tending to show the relation of the real estate to the town, the business relations between the town and the owner of land sought to be annexed, and the mutual benefits arising therefrom, was competent. *pp. 334, 335.*

SAME.—*Annexation*.—*Evidence*.—The motives of an individual member of the board can not affect the right of the town to annex

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territory, and evidence of ill feeling of a member of the board toward the owner of property sought to be annexed was properly excluded. *p. 335.*

APPEAL AND ERROR.—*When Cause Must be Affirmed.*—Where it appears from the record that the cause was fairly tried and correctly determined upon its merits it is the duty of the Appellate Court to affirm the judgment. *p. 336.*

From Putnam Circuit Court; *P. O. Colliver*, Judge.

Annexation proceedings by the board of trustees of the town of Cloverdale, to which James H. McCoy remonstrated. From a judgment for petitioners, remonstrant appeals. *Affirmed.*

J. P. Allee and *T. T. Moore*, for appellant.

J. C. Akers, *J. H. James* and *S. A. Hays*, for appellee.

ROBY, J.—Appellee, by this proceeding, sought to annex a strip of adjoining unplatted land, owned by appellant. A petition was filed at the June term, 1900, of the board of commissioners of Putnam county, notice thereof being given by publication and by serving a copy upon appellant, who appeared before the board and moved to quash the notice, the affidavit of service, and the proof of publication, and also to dismiss the petition. Ten reasons were assigned as a basis for such motion. The eighth one being “that the petition is insufficient because the same does not set out and specify sufficient reasons for the annexation of said territory.” The ninth and tenth reasons given both go to the sufficiency of the petition.

The motion contains a recital as follows: “Comes now James H. McCoy, and enters his special appearance herein.” The appearance was, notwithstanding this statement, a general one. The motion made involved the merit of the action, and was one step in it. *McCoy v. Stockman*, 146 Ind. 668. Having appeared to the action, defects in the publication of notice do not affect appellant injuriously. The motion to dismiss being overruled, appellant filed answers in the nature of a remonstrance. Trial, finding,

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and judgment in appellant's favor. Appellee appealed to the circuit court, where there was a trial by the jury, verdict for petitioners, motion for a new trial overruled, judgment on verdict, from which this appeal is taken.

In the circuit court appellee amended its petition, omitting therefrom part of the lands originally included therein. There was no error in permitting such amendment. *Wilcox v. City of Tipton*, 143 Ind. 241.

A demurrer to the amended petition for want of facts was overruled. The averments of the pleading show that the persons residing in the territory sought to be annexed have all the advantages of town government and its institutions, enjoying the police and fire protection and public school privileges; that the town needs additional revenue with which to maintain its schools and to provide adequate means for the prevention of fires; that the territory sought to be annexed is contiguous to the town; that there is no public way for ingress to or egress therefrom except over and along the streets of the town; that it has expended a large amount of money for crushed stone to use upon its streets, and has provided stepping stones at crossings, and that notwithstanding those who reside in said territory receive the full benefit of such improvements they did not contribute to the making, nor do they contribute to the maintenance thereof, and that the land contained in the said territory is greatly enhanced in value by reason of its proximity to the town. The statements so summarized are much elaborated in the petition. They are quite sufficient to justify the proposed annexation. One who receives the benefit of public improvements, school privileges, and police protection, ought to contribute to the necessary expenses of their maintenance. *Lake Erie, etc., R. Co. v. City of Alexandria*, 153 Ind. 521; *Paul v. Town of Walkerton*, 150 Ind. 565; *Catterlin v. City of Frankfort*, 87 Ind. 45.

The further objection to the petition is that it does not contain a description of the property sought to be annexed.

Referring thereto, the pleading contains an averment as follows: "That the same is fully and accurately described by metes and bounds in an amended map or plat, which is hereto attached, and made a part hereof as exhibit B, and is duly verified by affidavit." The exhibit thus referred to contains a description of the lands as stated. The statute under which the proceeding is had prescribes that the petition shall set forth the reason for such annexation. Its further provision relative to the description of the territory sought to be annexed is as follows: "And shall accompany the same with a map or plat accurately describing, by metes and bounds, the territory proposed to be attached, which shall be verified by affidavit." §4426 Burns 1901. The map or plat thus filed with the petition can not be regarded as an attempt to make an instrument not the foundation of an ordinary civil action a part of the complaint by reference thereto. The procedure directed by the statute having been followed, the petition is sufficient. The demurrer to the amended petition was, therefore, correctly overruled.

Appellant's motion for a new trial specifies sixty-three grounds therefor. The importance of the case is not sufficient to justify a detailed review of each one of them. A careful examination satisfies us that no reversible error was committed in the trial of the case.

Appellee was permitted to prove that the appellant's real estate was enhanced in value by reason of its proximity to the town; that there was a demand for platted lots adjoining the town; that appellant had talked of laying out some lots, and said he would like to have \$120 to \$125 for some of them; that appellant had served as school trustee for said town while living on said land; that he was street commissioner in the town; that he asked one witness, who had had land annexed, what steps he took to get in, and said that he was going in; that he claimed the full amount of his salary as trustee and treasurer of the board; that he talked about resigning therefrom; that he told another witness

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that "the small plat of ground where he lives was taken in, and he was in the town"—to all of which, as testified to by various witnesses, and repeated in various forms, appellant objected and excepted. The evidence tended to show the relation of the real estate to the town, the business relations between it and the owner of the land in the territory to be annexed, and the mutual benefits arising therefrom, and was, therefore, competent. *Windfall Mfg. Co. v. Emery*, 142 Ind. 456.

Evidence was excluded to the effect that the town assessor "had attempted, and had in fact enforced, the taking of property for assessment, the owners of which lived outside the corporation." Appellant offered to prove various facts relative to collateral and irrelevant matters. One of them was the existence of ill feeling toward him on the part of a member of the town board. The motive of an individual member of the board can not affect the right of the town to annex territory. This class of testimony was correctly excluded.

The following record of the board of trustees was introduced in evidence: "Cloverdale, Indiana, April 30, 1880. Board of trustees met in special session. President P. M. Sandy in the chair. James H. McCoy having presented a petition asking that he be annexed to the corporation, and receive all the benefits, etc., resulting from said corporation. On motion of G. M. Hendricks that such described premises of said James H. McCoy be and is now annexed to said town." Also its record of June 9, 1893, containing, among other things, the following: "James H. McCoy was elected by the board to succeed W. K. Pritchard as school trustee of said ward." Also, its record of June 20, 1895, containing, in part, the following: "James H. McCoy presented his resignation as school trustee of the town of Cloverdale to the honorable board, and upon motion and second was accepted." This evidence tended to show the relations between the parties and was properly received.

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Appellant moved to tax all costs made prior to the amendment of the petition to the petitioner. The statute is: "The party amending shall pay the costs of the leave to amend. When the trial is not delayed by reason of the amendment, no other costs shall be taxed." §397 Burns 1901. The motion was too broad. The presumption is that the action of the court in refusing to make the taxation requested was correct. *McCutchen v. McCutchen*, 141 Ind. 697, 700.

There does not appear to have been any prejudicial error committed against appellant. The merits of the cause seem to have been fairly tried and correctly determined. In such case it is the duty of this court to affirm the judgment. §670 Burns 1901. *Wortman v. Minich*, 28 Ind. App. 31.

The judgment is therefore affirmed.

UNION TRACTION COMPANY OF INDIANA v. LOWE.

[No. 4,372. Filed June 24, 1903.]

NEGLIGENCE.—*Wilful Injury*.—*Complaint*.—A complaint for a wilful injury must allege that the injurious act was purposely and intentionally committed with the intent wilfully and purposely to inflict the injury complained of. p. 337.

SAME.—*Wilful Injury*.—*Complaint*.—A complaint for wilful injury being *quasi criminal* in its nature should be strictly construed. p. 338.

From Delaware Circuit Court; *J. G. Leffler*, Judge.

Action by George Lowe against the Union Traction Company of Indiana. From a judgment for plaintiff, defendant appeals. *Reversed*.

J. A. VanOsdol, W. A. Kittinger, A. W. Brady and Rollin Warner, for appellant.

N. N. Spencer and Frank Ellis, for appellee.

HENLEY, J.—Appellee's complaint in this case was in two paragraphs, in both of which he seeks to recover damages for an alleged personal injury sustained by him while a passenger in one of appellant's cars in the city of Muncie.

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The first paragraph of the complaint proceeds upon the theory that the injury complained of was caused by appellant's negligence. This paragraph of complaint states a cause of action, and appellant's demurrer thereto was properly overruled.

The second paragraph of complaint proceeds upon the theory that the alleged injury was wilfully inflicted. The averments of appellee's complaint by which he attempts to charge a wilful injury were as follows: "Plaintiff further avers that said starting of said car with said sudden and violent jerk, without notice or warning to plaintiff, was the proximate cause of all of plaintiff's said injuries, and that because of plaintiff's said attitude and condition plaintiff's said fall and injuries were the natural and necessary and probable and inevitable consequences of defendant's act of so starting said car without notice or warning to plaintiff, and that defendant had full knowledge of plaintiff's said attitude and condition, and with full knowledge of all the facts in this paragraph of complaint alleged, and without notice or warning to plaintiff, intentionally, purposely, and wilfully so started said car, utterly regardless of the safety or peril of plaintiff, and with full knowledge of the fact that the natural and probable consequences of so starting said car, under the circumstances, would be the fall and injury of plaintiff." This paragraph of complaint is clearly insufficient. It falls far short, under the law as announced in the decided cases in this State, of stating a cause of action for a wilful injury. It seems to be the settled law of this State that a complaint which seeks redress for a wilful injury, involving, as it does, conduct which is *quasi* criminal, must aver that the injurious act was purposely and intentionally committed with the intent wilfully and purposely to inflict the injury complained of. *Gregory v. Cleveland, etc., R. Co.*, 112 Ind. 385; *Kalen v. Terre Haute, etc., R. Co.*, 18 Ind. App. 202, 63 Am. St. 343;

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Walker v. Wehking, 29 Ind. App. 62; *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274.

In the complaint before us nothing more than the wilful starting of the car is alleged, and there is no allegation that appellant intended thereby wilfully and purposely to injure appellee. The recital of evidence, in a complaint based on an alleged wilful injury, which would tend to prove that the defendant acted with a reckless disregard for the safety of plaintiff and a willingness to inflict the injury complained of does not help the pleading, but such evidence upon the trial would be competent to support and uphold the allegation of wilfulness. The complaint in an action of this character, *quasi* criminal in its nature, and involving as it does an intent to inflict the injury complained of, ought to be strictly construed by the rules of pleading herein announced.

Judgment reversed, with instruction to the trial court to sustain appellant's demurrer to the second paragraph of complaint.

Robinson, C. J., Wiley, Comstock, and Roby, JJ., concur; Black, J., dissents.

RISTINE v. CLEMENTS ET AL.

[No. 4,602. Filed April 2, 1903. Rehearing denied June 24, 1903.]

INTOXICATING LIQUORS.—License.—Note Given in Payment.—Where a town ordinance required the payment of the license fee in advance of the issuing of a license to sell intoxicating liquors, a note given in payment for such license is without consideration, and void. *pp.* 339–349.

MORTGAGES.—False Representations Made to Wife.—Where a wife was induced to sign a mortgage upon false representations that money to be furnished by the mortgagee would pay all the encumbrances upon the land, and that such mortgage would be the only mortgage remaining thereon, the mortgage was void as to her. *pp.* 349, 350.

From Montgomery Circuit Court; *Jere West*, Judge.

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Action by Dora Clements against Hosea Ristine and others. From a judgment for plaintiff, defendant Ristine appeals, and appellee Clements assigns cross-errors. *Reversed on cross-errors.*

Benjamin Crane and A. B. Anderson, for appellant.

M. M. Bachelder, C. H. Jones and J. B. Murphy, for appellees.

ROBINSON, J.—This cause was transferred from the Supreme Court under the act of March 12, 1901.

Suit by appellee to recover one-third of the proceeds of the sale of certain land owned by her husband, and to enjoin the sheriff from paying such money to certain judgment creditors of the husband.

The court found the facts as follows: Dora and Robert Clements are husband and wife, Robert Clements being a householder having property of all descriptions worth less than \$600. In 1888 he became the owner of certain real estate particularly described, and borrowed from the Ladoga Building Association \$1,400, and to secure the same he and his wife executed mortgages on the land. In 1895 the building association filed its complaint against the mortgagors and George Green, William Hostetter, John Maloney, William J. Davis, and Thomas Rankin, and obtained judgment against Clements for \$541.11 and a foreclosure of the mortgage against all the defendants. It was averred in that complaint: That the liens of all the defendants other than Clements were inferior to the building association mortgage, and it was so adjudged in the decree; that the land was ordered sold by the sheriff, and he was directed to apply the proceeds from the sale (1) to the payment of costs, (2) to the payment of the amount due the building association, and (3) to the payment of the amount due Davis and Rankin on their judgments, the overplus, if any, to be paid to the clerk of the court for the use of the parties lawfully authorized to receive the same; that the sheriff,

on July 25, 1896, sold the real estate to Hosea H. Ristine for the sum of \$1,200, which was its reasonable value, and which he received from Ristine, and after paying the building association the amount due on its mortgage and all costs there yet remained in his hands \$562.16, which amount the sheriff has never accounted for, but retained the same up to the time of his death in 1901; that John L. Davis is now the executor of his estate, and on October 16, 1901, paid the money to the clerk of the court, to be paid out as the court might order; that no one redeemed from this sale, and on the 29th day of July, 1897, Ristine received a deed for the same, and has ever since been the owner; that in the foreclosure proceedings no averment is made in the complaint against Dora Clements, except that she executed the mortgage with her husband; that no averment is made against Hostetter or Green, except that they have mortgages upon the real estate which are inferior to the plaintiff's, and that no averment is made against Maloney, Davis, or Rankin, except that they have judgments against Robert Clements, and that they are liens inferior to plaintiff's; that the prayer of the plaintiff was for judgment against Robert Clements in a named sum, and a foreclosure of its mortgage against all the defendants, and for the sale of the land free from the claims of the defendants; that all of the defendants were regularly served with summons; that Robert and Dora Clements, Green, and Hostetter each made default; that Rankin, Davis, and Maloney filed answers, setting up their several judgments, and asked that their interests be protected, and if the mortgaged premises should sell for more than enough to pay the mortgages, that the excess be paid to them; that on the day of, and just prior to the time of, the sale of the land Robert Clements presented to the sheriff his schedule, claiming his exemption as provided by law, and demanding that the sheriff set over to him as exempt all the money that might remain arising from the sale after the payment of the building associa-

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tion mortgage, but that the sheriff refused to pay the same or any part thereof, and refused to accept his schedule; that Dora Clements at the same time demanded of the sheriff that he turn over to her the one-third part arising from such sale, if that much remained after the payment of the building association mortgage, and that if that amount did not remain, that the part that did remain be turned over to her as the wife of Robert Clements, on account of her interest as such wife in the lands, which the sheriff refused to do, and on the day of the sale she brought this suit to obtain one-third of the proceeds of such sale, and at the time of filing her suit she obtained a restraining order enjoining the payment of the money as in the decree ordered, and the executor of the sheriff still holds the same to abide the result of this suit; that in May, 1891, Hartman and Snyder obtained a judgment against Clements; that they were not made parties to the foreclosure suit, and that Ristine paid to them the amount of their judgment, and such judgment was thereupon satisfied; that in April, 1895, Davis and Rankin obtained a judgment against Robert Clements upon a contract for \$921, which has never been paid, but which is still in force and effect. In 1893 Robert Clements was engaged in the sale of intoxicating liquor, and was indicted and convicted for violations of the law and fined, amounting in fines and costs to \$240.20, and was committed to jail until such judgments were paid or replevied; that these judgments were replevied by one Isaac Clements, and that Robert Clements has never paid any part of the same, except as hereinafter set forth. In June, 1895, Clements executed his note to Hostetter for \$160, and to secure the same Clements and wife executed a mortgage on the land, and no part of the note and mortgage has ever been paid or satisfied; that this note and mortgage were executed under the following conditions: In June, 1895, Robert Clements was engaged in the sale of intoxicating liquors in the town of Ladoga, and had, from the 1st

day of March, 1895, been selling and carrying on such business without a license from the town, and the town board had previous thereto often demanded of him that he take out a license and pay the fee therefor, which they claimed to be \$150; that previous to June, 1895, the matter had been considered by the town board, and they were instructed by their attorney that it was doubtful whether they could collect any license fee, and doubtful if they could convict Clements for the violation of any ordinance; that the attorney was thereupon instructed to collect such fee or in some way secure the same; that the attorney informed Clements and his wife that he would prosecute Clements for a violation of the ordinance if the fee was not paid, and, that if they could not raise the money, that Hostetter, the town clerk, would furnish the money and pay for the license, and the same would be issued to Clements and dated back to the 1st day of March, 1895, if Clements would execute his note to Hostetter for \$160, which would be \$150 furnished by Hostetter for the license and \$10 for the attorney's services.

The court further found: That the town of Ladoga did not intend to, and did not believe that it could, collect the license fee by law, or prosecute Clements for a violation of the ordinance, and that Hostetter had never at any time agreed to furnish the \$150, or any part thereof; that the representations made by the town attorney were not believed by him to be true, at the time they were made, and were made for the purpose of inducing Robert Clements to execute his note, and to induce Robert and Dora Clements to execute the mortgage; that the Clements believed these statements to be true, and on account of the same executed the note and mortgage to Hostetter; that the town attorney, after he procured the note and mortgage, reported to the town board what he had done, and they ratified his actions, and authorized the town clerk, the payee named in the note and mortgage, to issue to Clements a license for one year,

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dating the same back to the 1st day of March, 1895, and Hostetter, as such clerk, was instructed to accept the note and mortgage in payment of the license fee, which he did as the property of the town of Ladoga; that Hostetter did not furnish any money upon the note and mortgage, and never paid any consideration for the same, and that the only consideration which was given for the note and mortgage was the license issued by the town to Clements and the services performed by the town attorney; that it was agreed that Hostetter should take the note and mortgage, and hold them for the use and benefit of the town, but the town was instructed by its attorney that if Clements should learn that Hostetter had not advanced the \$150 in payment of the license fee, that he could, and would probably, defeat the note and mortgage, and that it was best that no record be made of their proceedings in the matter, and no record ever was made; that when this note and mortgage were executed there was in force a town ordinance concerning liquor licenses from the town board, and requiring the payment of \$100 as a license fee; that Clements, on the 1st day of March, 1895, obtained a county license, and he continued to sell within the town up to the 1st day of March, 1896, and for sometime thereafter; that in October, 1895, having failed to pay the judgments against him in favor of the State, executions were issued and delivered to the sheriff, who was threatening to arrest Clements; that at that time he borrowed from Green the sum of \$1,000, Clements pretending to give to Green a list of all his indebtedness, which was a correct list except the judgment for \$921 in favor of Davis and Rankin, and Green was at the time ignorant of the existence of this judgment, Green believing that the amount of the encumbrances on the land included the building association mortgages, the judgments in favor of the State, and the mortgage to Hostetter, and that when these were paid off, and a mortgage by Robert Clements and his wife would be a first lien on the land, he drew his check for

\$1,000, delivered it to his agent, who deposited it in a bank; that Dora Clements up to that time had not agreed to sign the mortgage, but being assured by the loan agent, who was loaning the money for Green, that the \$1,000 would pay off all the liens against the land, she agreed to and did sign and execute the mortgage, and that she never received any consideration for the mortgage, and never received any part of the \$1,000; that the agent of Green thereupon executed a check to the building association for the amount due upon its mortgages, and also paid in cash to the sheriff \$240.20, the amount due upon the executions in the sheriff's hands on the judgments in favor of the State; but, having learned at that time that the judgment of \$921 in favor of Davis and Rankin had not been taken into consideration, he stopped the payment of the check which he had given the building association and the check was never paid, and the agent immediately demanded of the sheriff the amount paid him upon the execution. The sheriff refused to refund the money, but retained it, returned the execution satisfied, and the judgments against Clements were thus paid and satisfied out of the money furnished by Green, and that the money so paid to the sheriff by the agent has never been repaid to Green; that as soon as the sheriff refused to refund such money, the mortgage to Green was immediately recorded, and the balance of the money remaining in the hands of the agent, and also the note and mortgage, were delivered to Green, and afterwards, on the 13th day of October, 1898, Green transferred and assigned to Hosea H. Ristine this note and mortgage, Ristine paying therefor the sum of \$50, the assignment of the same being as follows: "For value received, I hereby assign this note to Hosea H. Ristine. October 13, 1898. George Green;" that the mortgage and note are now the property of Ristine, and that nothing has ever been paid upon this note and mortgage other than the return of money to Green as above set out. In 1896 one

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Harvey was attorney for the town of Ladoga, and when Dora Clements prepared to file her complaint she did not desire to do so if the town should insist that the mortgage executed to Hostetter would be by the town claimed to be a lien on her interest; that her attorney and Harvey agreed that, if she should file a suit to obtain her interest in the land and the proceeds of the sale, the town would not claim any lien upon any money which might be ordered and found due her from the sale, if Robert Clements should file his suit and attempt to obtain the amount due him by exemption; that Dora Clements thereupon filed this action, and the same was determined against her in the lower court, and she appealed the same to the Supreme Court, and obtained a reversal thereof; that Robert Clements, in 1896, filed his suit demanding his exemption out of such proceeds, and both parties are now prosecuting their suits; that after the reversal of her suit her attorney appeared before the town board, and informed them of his agreement with Harvey, and represented that the note and mortgage executed by Clements and wife to Hostetter were worthless, and that their only chance to realize thereon was through the agreement with Harvey; that the town board at the time believed that the only ordinance upon the subject of liquor licenses was the ordinance of 1877, which had been in fact superseded by the ordinance of 1880, and that they did not know of the existence of this last named ordinance, and, believing the note and mortgage could not be enforced, the board authorized Hostetter to assign the same to one Daugherty to use the same for whatever benefit it might be to Dora Clements; thereupon Hostetter, who was no longer town clerk, assigned the note and mortgage to Daugherty; that the assignment was made without any consideration by Daugherty or Dora Clements to the town; that nothing has ever been paid on the same, which is long past due; that Daugherty, upon application, was thereupon made a party to this suit, and filed his cross-complaint to foreclose, and

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afterwards assigned the note and mortgage to Dora Clements.

The court stated as conclusions of law: (1) The assignment to Daugherty of the Clements' note and mortgage given to Hostetter was void, and transferred no interest the town had therein; (2) that the mortgage is valid to the extent of \$100 upon the funds involved in this suit; (3) that the mortgage by Robert and Dora Clements to George Green is void as to Dora Clements, and valid as to Robert in the sum of \$240.20; (4) that Ristine should be subrogated to the rights of the State in its several judgments against Robert Clements, and that he has a first lien on the interests of Robert Clements in the fund in controversy; (5) that Robert Clements' interest in the fund is \$162.16, and that the lien of Ristine should be foreclosed on that amount; (6) that Ristine should recover \$290.20 from Robert Clements, and is entitled to \$162.16 of the fund paid the clerk by the executor of Davis' estate; (7) that the town of Ladoga should recover \$100, and is entitled to a judgment against Robert Clements for that sum and the foreclosure of its mortgage upon the funds in controversy against Robert and Dora, and that the town has a lien for that sum upon the amount due Dora Clements; (8) that Dora Clements is entitled to \$300 of the money in controversy; that her interest would be \$400, but the town is entitled to \$100 of that sum. Nine, ten, and eleven are concerning costs.

This is a third appeal. *Davis v. Clements*, 148 Ind. 605; *Clements v. Davis*, 155 Ind. 624. Upon the last appeal it was held that Dora Clements was entitled to one-third of the proceeds realized on the building and loan foreclosure sale, there being a sufficient amount remaining to pay such third after paying the mortgage debt. In the trial court, when the case was remanded, new parties were made and new issues joined.

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Appellant Ristine and appellee Dora Clements each excepted to each conclusion of law. They each—the former by assignment of error and the latter by an assignment of cross-error—question the validity of the note and mortgage given Hostetter for the license fee.

Prior to the approval of the act of March 31, 1879 (Acts 1879, p. 201), which amended §22 of the act of 1852 (1 R. S. 1852, p. 482), towns were not authorized to license by ordinance the sale of intoxicating liquors. The seventh clause of §22 of the act of 1852, which is the seventh clause of §4357 Burns 1901, authorizes towns to license the sale of intoxicating liquors, and provides that, “a sum not exceeding the amount required by the statutes of the State for license to sell or retail intoxicating liquors, may be required to be paid into the treasury of the corporation by the person so licensed before receiving such license.” At the time Clements and wife gave the note and mortgage for the license fee, there was in force an ordinance of the town of Ladoga making it unlawful to sell liquors in the town without first procuring from the board of trustees a license, and also providing that a person desiring to obtain such license should make application to the clerk of the board, showing he had obtained a license from the proper county authorities, and should tender a receipt from the town treasurer for \$100 as payment for the license for one year from the date of its issue, whereupon the clerk should make out a license authorizing such sale for one year, which license should be signed by the president of the board and attested by the clerk.

The statute leaves it optional with the town whether it will require the payment of the license fee in advance of the issuing of the license. But by the ordinance the license could not be issued until the applicant presented the treasurer's receipt for \$100 as payment for the license.

The right given by the legislature to a town to require a license to sell liquor has for its object the restriction of the

business and is upon the theory that the business is one "which requires restraint because it is harmful to society." *City of Indianapolis v. Bieler*, 138 Ind. 30; *Emerick v. City of Indianapolis*, 118 Ind. 279. The granting of the license is not the execution of a contract, but is a permit granted under laws enacted in an exercise of the police power of the State. *McKinney v. Town of Salem*, 77 Ind. 213.

An ordinance enacted with the formalities required by law has the same effect within the corporate limits and with respect to persons upon whom it lawfully operates that a legislative act has upon the people at large. The inhabitants of the particular locality are the corporation, which is represented by the board of trustees. When the trustees, clothed with local and limited powers of sovereignty, have enacted an ordinance or local law, thus prescribing a general and permanent rule, they have no authority to set aside or disregard the ordinance except in some manner prescribed by law. See *Swindell v. State, ex rel.*, 143 Ind. 153, 35 L. R. A. 50; *Citizens Gas, etc., Co. v. Town of Elwood*, 114 Ind. 332; *Bills v. City of Goshen*, 117 Ind. 221, 3 L. R. A. 261. They simply represent the municipality, and with the ordinance in force they had no authority to issue a license except as provided by the ordinance. A condition precedent to issuing the license was presenting a receipt from the town treasurer for \$100. The trustees had no authority to exact the license fee except by virtue of the ordinance.

It is true that a municipal corporation has the power to receive, as payee, a note and mortgage for a debt lawfully due to such corporation. But a license fee, the payment of which is a condition precedent to issuing the license, is in no sense a debt owing the municipality. The fact that he had been selling for some months without a license did not make him indebted to the town for the license fee. If he voluntarily sold during those months without attempting to

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procure a license, he simply violated the ordinance, and was subject to its penalties. In such case the license, when issued, could not be dated back to protect sales made before the license was issued. The license could not be issued until the fee was paid, and if sales were made they were made without a license, not under a license that was not paid for. The primary purpose in exacting the license fee is not to increase the revenue of the municipality, but it is imposed from motives of public policy to restrain the sale of a commodity that is harmful to society. The language of the ordinance admits of no doubt that the payment of the license fee is a condition precedent to the issuing of the license, and that it requires that the money should be paid into the town treasury. If the town authorities may disregard the provisions of an ordinance in part, they may disregard it as a whole, and, as the whole ordinance could be practically annulled by the acceptance of a note for the license fee, such note is void as being contrary to public policy. Moreover, a license issued without the payment of the license fee as contemplated by the ordinance is a void license, and a note given in payment for such license is without consideration. *Hencke v. Standiford*, 66 Ark. 535, 52 S. W. 1; *Zielke v. State*, 42 Neb. 750, 60 N. W. 1010; *Fry v. Kaessner*, 48 Neb. 133, 66 N. W. 1126; *Doran v. Phillips*, 47 Mich. 228, 10 N. W. 350; *McWilliams v. Phillips*, 51 Miss. 196; *City of Craig v. Smith*, 31 Mo. App. 286; *Munsell v. Temple*, 8 Ill. 93; *Spake v. People*, 89 Ill. 617; *Handy v. People*, 29 Ill. App. 99; *Houser v. State*, 18 Ind. 106; *Dudley v. State*, 91 Ind. 312; *McLeod v. Scott*, 21 Or. 94, 26 Pac. 1061, 29 Pac. 1; *Black, Intox. Liq.*, §§183, 184.

Upon the facts, the conclusion of law that the mortgage by Robert and Dora Clements to Green is void as to Dora Clements is right. She was induced to sign the mortgage upon representations made to her that the money to be furnished by Green would pay all encumbrances, and that the

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Green mortgage would be the only encumbrance on the land, which representations were not true. The finding does not show that the validity of the Green mortgage was adjudicated in the foreclosure suit by the building and loan association. The complaint in that case simply averred that on a certain date Green took the mortgage from the Clements "which plaintiff says is subsequent to their mortgage." Green did not ask any adjudication as to his mortgage by way of cross-complaint or otherwise, but suffered default.

Upon the cross-errors assigned by Dora Clements the judgment is reversed, with instructions to restate the conclusions of law.

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[No. 4,461. Filed June 25, 1903.]

APPEAL.—*Question of Law.*—*Bill of Exceptions.*—*Review.*—Where an appeal has been taken under §642 Burns 1901, and the question reserved is upon the admission or exclusion of evidence, the bill of exceptions should show that the objection was made, with the grounds of objection, and that exception was taken at the time. *p. 351.*

SAME.—*Motion to Strike Out Evidence.*—*Bill of Exceptions.*—*Review.*—The ruling of the trial court on a motion to strike out "all the evidence" of a certain witness will not be reviewed on appeal, where the bill of exceptions sets out only a part of the evidence given by the particular witness. *p. 352.*

TRIAL.—*Instructions.*—The trial court may refuse to give instructions that are a substantial repetition of instructions already given. *p. 352.*

SAME.—*Instructions.*—*Number of Witnesses.*—*Preponderance of Evidence.*—It is not error for the trial court to refuse an instruction that would give or have a tendency to give the jury to understand that the preponderance of evidence is to be determined by the number of witnesses testifying on each side. *p. 352.*

From Adams Circuit Court; *R. K. Erwin*, Judge.

Action by the State, on the relation of Evelyn Eckert, against Erastus Fritzinger. From a judgment for relatrix, defendant appeals *Affirmed.*

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A. P. Beatty, John Schurger and D. E. Smith, for appellant.

ROBINSON, C. J.—Prosecution against appellant on a charge of bastardy.

The bill of exceptions recites that appellant notified the court of his intention to take the questions of law involved in the motion for a new trial to the Appellate Court upon the bill of exceptions only, as provided in §642 Burns 1901. This statute provides that, when the question so reserved is shown by the bill of exceptions, the party excepting shall notify the court that he intends to take the question of law to the appellate tribunal upon the bill of exceptions only, and that the court shall cause the bill to be so made that it will distinctly and briefly embrace so much of the record only and the statement of the court as to enable the court to apprehend the particular question involved. As it has been held that this section and §639 Burns 1901 are to be construed *in pari materia* (*Starry v. Winning*, 7 Ind. 311; *Indiana, etc., R. Co. v. Adams*, 112 Ind. 302), it follows that if the question reserved is upon the admission or exclusion of evidence the bill should show that objection was made, with the grounds of the objection, and that the exception was taken at the time the ruling challenged was made. We can review such questions only as have been decided by the trial court, whether presented under this section of the code or by an appeal in any other mode. *Short v. Stutesman*, 81 Ind. 115; *Elliott*, App. Proc., §§236, 239; *Ewbank's Manual*, §96. It necessarily follows that in an appeal under this section the appellate court will consider only such objections to the admission or exclusion of evidence as were presented to the trial court. In no other way could it be made to appear that the particular question of law decided by the trial court during the progress of the cause is presented for decision on appeal.

Where the grounds of objection are not shown, no question is presented.

We can not review the action of the trial court in overruling a motion to strike out "all the evidence" of a certain witness, when the bill of exceptions sets out only a part of the evidence given by the particular witness.

It is not error to refuse to give an instruction where the substance of the material part of the instruction is contained in instructions that are given.

The court properly instructed the jury that the preponderance of evidence does not necessarily consist alone in the greater number of witnesses testifying to a particular fact or state of facts, but was to be determined from a consideration of all the evidence given in the case, the apparent consistency, fairness, and congruity of the evidence, and the reputation of the witnesses for truth and veracity when shown, and that if the jury found that the evidence bearing upon appellee's case was evenly balanced, or that it preponderated in favor of the appellant, the verdict should be for the appellant. As the substance of the instructions requested upon the subject of the preponderance of the evidence was contained in instructions given by the court, there was no reversible error in refusing to give them. It has been decided many times in this State that the trial court may refuse to give instructions that are a substantial repetition of instructions already given, and which are as favorable to the party making the request as are the instructions refused.

It is not error to refuse an instruction that would give or have a tendency to give the jury to understand that the preponderance of evidence is to be determined by the number of witnesses testifying on each side. *Howlett v. Dilts*, 4 Ind. App. 23.

The court very fully instructed the jury upon the facts and circumstances they might consider in determining the credibility of the witnesses—among other things, statements, if any, made out of court, inconsistent with those

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made on the trial. The relatrix was a witness, and the instruction was applicable to her testimony as well as to that of the other witnesses. Moreover, in a separate instruction, the principle was stated with reference to the relatrix as a witness.

The court properly instructed the jury, and at considerable length, upon the material questions in the case. No good purpose would be subserved in setting out the instructions. A very careful study of all the instructions given leads to the conclusion that no reversible error was committed against appellant in the court's refusal to give certain instructions. No question is made as to the correctness of any instruction given. They covered the material questions in issue, and, taken as a whole, presented the case fully and fairly to the jury.

As it is conceded that no exception was taken to the remark made by the court that "it seems to me that this witness has padded her testimony," the question is not properly saved. To present the question for review, an exception should have been taken to the remarks of the court, and the alleged misconduct stated as one of the grounds for a new trial. *Chicago, etc., R. Co. v. Brown*, 157 Ind. 544.

Judgment affirmed.

BROWER ET AL. v. LOCKE, BY NEXT FRIEND.

[No. 3,994. Filed June 26, 1903.]

NEGLIGENCE.—Violation of Statute.—Master and Servant.—The assignment of a young and inexperienced person to cleaning machinery while in motion, in violation of §7087i Burns 1901, is negligence *per se*. pp. 357, 358.

SAME.—Cleaning Machinery While in Motion.—Children.—Defendants are not relieved from liability for negligence, under §7087i Burns 1901, prohibiting the employment of persons under sixteen years of age to clean machinery while in motion, because of the fact that the

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part of the machine on which plaintiff was ordered to work was not in motion, where the parts of the machine designed to move were in motion. *p. 358.*

MASTER AND SERVANT.—*Negligence.*—*Violation of Statute.*—The employer can not put upon the employe the risks that arise from the employer's violation of a statute. *p. 359.*

SAME.—*Defects.*—*Assumption of Risks.*—A verdict for plaintiff for injuries received while operating defective machinery will not be reversed on the ground that plaintiff assumed the risk, where it does not appear that the defects and consequent danger were obvious, since plaintiff was not required to look for defects that might possibly exist. *pp. 359, 360.*

From the Superior Court of Marion County; *J. M. Leathers*, Judge.

Action by Harry Locke, by his next friend, against Abram G. Brower and others. From a judgment for plaintiff, defendants appeal. *Affirmed.*

W. H. H. Miller, J. B. Elam, J. W. Fesler and S. D. Miller, for appellants.

J. B. Kealing and M. M. Hugg, for appellee.

COMSTOCK, P. J.—Action by appellee against appellants for damages for personal injuries received by appellee while in the employ of appellants. The complaint is in three paragraphs.

The material allegations of the first paragraph are: That the plaintiff was, on the 12th day of July, 1900, the date of his alleged injury, an infant under the age of sixteen years, to wit, fourteen years of age; that the defendants on said date were, and for a long time prior thereto had been, the owners of and engaged in operating a mill, in the city of Indianapolis, for the manufacture of cotton products, and in which they operated a large number of carding machines; that on each of said machines were two cylinders revolving with great force and speed, and around said cylinders were set and arranged a large number of wire teeth, composed of iron or steel, being set and arranged as a brush, and bent at an angle; that said machines had a guard or cover over and in front of said cylin-

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ders, which was fastened and held in place by a catch to the side and towards the top of said machines, and were so arranged upon hinges that said guard or cover could be let down, leaving said cylinder exposed; that when any of said machines were run with said guard or cover down, it was highly dangerous to operate; that in carding said cotton the dust, dirt, and extraneous matter in said cotton would accumulate on said guards or covers, and other parts of said machines, requiring them to be frequently cleaned; that on the afternoon of July 9, 1900, plaintiff was employed by the defendants to work in their said mill, and was by their agents placed to work upon a number of said carding machines, and a part of his duties as such employe was to clean said machines; that plaintiff was of ordinary intelligence and education for one of his years, but inexperienced in the use and operation of machinery of all kinds, and had no experience in running or operating carding machines or in working about them; that plaintiff was carelessly and negligently instructed by the agents of defendants, who had charge of said machines upon which he was directed to work, to clean said machines, and the guards or covers upon the same, while said machines were in operation, and to do such cleaning with waste cotton and other material furnished him for the purpose; that because of plaintiff's tender age and inexperience he was not capable of understanding or comprehending the danger attending the operation of said machines; that on said 12th day of July, 1900, while plaintiff, pursuant to his instructions as aforesaid, was cleaning one of said carding machines upon which he was directed to work, and while the same was in motion, the guard or cover to which, in some manner unknown to plaintiff, had, without any fault, carelessness, or negligence on his part, become unfastened and open, leaving the cylinders in said machines exposed, his right hand was caught by the wire teeth around the same, and his right hand and arm were drawn into said machine, so injuring his arm as to re-

quire amputation at the shoulder, and otherwise injuring him to his damage in the sum of \$10,000.

The second paragraph, after alleging appellee's age, the operation of carding machines, and his employment by appellants, avers that appellee was inexperienced in the use and operation of machinery of all kinds, and had no experience in running or operating carding machines or working about the same; that appellee was carelessly and negligently instructed by the agents of appellants, who had charge of said machines, to clean said machines upon and about which he was directed to work, and the guards or covers upon the same, while said machinery was in full operation and motion, and to do so with waste cotton or other material furnished him for that purpose; that he was not in any way instructed as to said guard or cover, or the danger attending the use of said machines, with the cylinders exposed; that because of appellee's tender age and inexperience he was not capable of comprehending the danger attending the operation of said machines; that while performing his duties as such employe of appellants, in cleaning one of appellant's carding machines while in motion, pursuant to his directions and instructions, he was injured, by reason of the guard or cover upon said machine becoming unfastened and dropping, in some manner unknown to appellee, without any fault or negligence on his part, leaving the cylinders exposed, by having his right hand and arm caught by the wire teeth around said cylinders, and so injuring him that it was necessary to amputate his arm.

The third paragraph sets out substantially the same facts as the second, and further alleges that he was put to work upon one of appellants' carding machines, upon which the catch, which should have held the guard or cover over the cylinders securely in place, was defective, and did not properly and securely catch and hold said guard or cover in place so as to guard and cover said cylinders; that it

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was not a part of appellee's duty to repair or inspect said machine or said catch; that he had no notice or knowledge of the defective condition of said catch and machine; that appellee relied upon appellants furnishing him with a safe and suitable machine to perform his duties; and that because of this defective catch he was injured.

The cause was put at issue by a general denial. A trial was had by jury, and a verdict returned for \$5,000, with answers to interrogatories.

The errors relied upon for reversal are that the court erred in overruling appellants' motion for judgment in their favor on the interrogatories and answers thereto returned by the jury, notwithstanding the general verdict, and in overruling appellants' motion for a new trial.

Conceding that the general verdict controls unless the special findings are irreconcilable therewith, appellants contend that such findings show that appellants were not guilty of negligence. One hundred and fifteen interrogatories were submitted to and answered by the jury. By them it was found that appellee's injury was not due to accident; that he was injured while cleaning the door or guard of a machine in motion, which he had been directed to clean while it was running; that he had not been instructed as to the danger of cleaning the door or guard while the machinery was running; that he was too young and inexperienced to appreciate the danger of the machinery upon which he was put to work; that appellee was, at the date of the accident, under the age of sixteen years, viz., fourteen years and one month. Section 7087i Burns 1901, provides that no person under the age of sixteen years shall be allowed to clean machinery while in motion. The failure to do an act commanded, or the doing of an act prohibited, is negligence *per se*. Thompson, Negligence (2d ed.), §10. The violation of the statute, the assignment of a young and inexperienced person to work upon machinery, without instruction as to the dangers attending such work, justified the

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jury in finding the appellants guilty of negligence. The burden of proving contributory negligence was on appellants. The special findings do not show that appellee was negligent.

It is argued that the evidence shows that appellee was not cleaning machinery of any kind at the time he was hurt. Appellants operated in their mill seventy carding machines, a general description of which is given in the complaint. When these machines were run with the guard cover over the cylinder, down, they were dangerous to operate. The door or cover rests on three hinges, is six inches wide and forty inches long, weighs six or eight pounds, and conforms to the convex surface of the large cylinder. The position of the door makes it necessary to raise the catch and pull the door back on its hinges about one and one-half inches before it will fall down. It is claimed by the plaintiff that in some manner unknown to him the door came open when he was about to wipe it off, and his hand was caught by the wire covering on the cylinder, and carried in between the cylinder and plate to which the door or cover was attached by the hinges. The part upon which appellee was at work was not in motion, and appellants claim that appellee was not cleaning machinery when in motion. By the Century and by the Standard Dictionaries, machinery is defined as parts of a machine considered collectively; any construction of mechanical means designed to work together so as to effect a given end.

When appellants were operating the machinery, lint and dust were flying through the air. The covers were an important, if not an essential, part of each machine. A machine is in motion when performing the function for which it is designed. All of the various parts may not change position, some are intended to be and remain stationary, but because they are not intended to move they are none the less a part of it. The working-parts of the carding

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machine—the parts designed to move—were in motion when appellee received his injury.

The purpose of the legislature in the enactment of the statute was the protection of the young and, presumably, inexperienced, by keeping them out of danger they were otherwise likely to encounter. We do not believe that the legislature intended to forbid the cleaning, by infants, of only revolving cylinders, pulleys, wheels, planes, or saws. The case at bar demonstrates the reasonableness, in view of the object of the law, of giving the statute a construction which does not limit its application to the cleaning of machinery that is itself a warning of danger, and which is rarely, if ever, attempted to be cleaned by an ordinarily prudent person when it is in motion.

The points stated by appellants in support of the motion for a new trial may be summarized as follows: A boy above fourteen years of age, of average intelligence, is presumed to be *sui juris* with respect to protecting himself from obvious danger. An infant assumes known risks, or those that might be known by the exercise of reasonable care, and the risk of pure accident, just as an adult. Instructions are unimportant when the facts causing the injury were learned, or might have been learned from any source, prior to the accident, by reasonable attention. A verdict can not be sustained against an employer when there is no evidence as to what brought about the existing condition, or how long it existed.

Appellee had no instruction nor knowledge of the condition making the situation dangerous. The jury found that the injury was not due to pure accident. The employer can not put upon the employe the risks that arise from his (the employer's) violation of a statute. *Davis Coal Co. v. Polland*, 158 Ind. 607, 620.

The jury have the right to draw reasonable inferences from the facts proved. There was evidence that the catch

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holding the door was defective, that the least touch would cause the door to fall down and that this condition existed about one month before the accident. They found that by proper instructions appellee would have discovered that the door was not properly adjusted, and the defective condition of the latch. It does not appear that the defects and the consequent danger were obvious to appellee, and he was not required to look for defects that might possibly exist.

The answers to interrogatories, and the evidence, show a violation of the statute by appellant. The proximate result of that violation, in the condition of the machine, was the injury of the appellee, to which it is not shown that he contributed, and the risk of which he did not assume.

Judgment affirmed.

PAYNE v. MOORE ET AL.

[No. 4,359. Filed February 27, 1903. Rehearing denied June 26, 1903.]

PARTY WALLS.—Excavations.—Damages.—Complaint.—A complaint for damages resulting from an injury to a wall located at the edge of an adjoining lot, caused by excavations made by the adjoining owner, which fails to allege that it was a party wall, that the excavating was negligently done, or the length of time the wall had stood, is bad against demurrer. *pp. 363, 364.*

SAME.—Excavations.—Damages.—Action by Lessee.—The fact that an excavation which injured a wall and damaged the property of a lessee of a building was made by the adjoining owner with the knowledge and consent of the owner and lessor of the building in which the damaged property was situated would not affect the right of the lessee to recover from the adjoining owner damages for the property destroyed. *p. 364.*

SAME.—Excavations.—Damages.—Knowledge.—The fact that the lessee of a building had knowledge of excavations being made by an adjoining owner which injured the wall of the building and did not interfere therewith would not relieve the adjoining owner from liability for injury to lessee's property. *pp. 364, 365.*

PLEADING.—Harmless Error.—Where the material facts set up in an answer were provable under the general denial which was filed, error in sustaining a demurrer thereto was harmless. *p. 365.*

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APPEAL AND ERROR.—*Waiver.*—Specifications of error not discussed are waived. p. 366.

SAME.—*Record.*—*Instructions.*—Instructions can not be considered on appeal where it does not appear by proper order-book entry that they were filed. p. 366.

SAME.—*Evidence.*—*Record.*—*Precipe.*—*Certificate.*—Where the precipe directed the clerk to prepare and certify “a full, true and complete transcript of all the proceedings, docket entries, motions, instructions asked, given, and refused, bills of exceptions, and all papers and affidavits on file, together with the motion for a new trial, and evidence, and judgments, and to certify the original manuscript of the evidence,” and the clerk certified that the foregoing “is a full, true, and complete transcript from the records in my office of all the pleadings, papers, entries, order-book entries, records, affidavits, bills of exceptions embodying the evidence, together with the motion for a new trial, instructions and all other motions and orders given in said cause,” and further certified that, after the trial, at the request of defendant’s attorney, the reporter filed in the clerk’s office her original long-hand manuscript of the evidence, duly certified, which was embodied in a bill of exceptions, and, after being certified and signed by the judge, was filed, it can not be said that the original manuscript of the evidence is not embraced in the bill of exceptions, and the evidence is in the record. pp. 366–368.

EVIDENCE.—*Reference to Documents.*—*Cross-Examination.*—Where in the trial of an action for damages to property the plaintiff testified to the value of the different items of property by reference to an invoice thereof made by himself and wife with a view of selling a half interest therein to a third person, it was proper to cross-examine him as to the source from which he got the values, and as to his opinion of the values of the items of property without reference to the inventory. pp. 369, 370.

From Putnam Circuit Court; *P. O. Colliver*, Judge.

Action by Charles E. Moore and another against Moses D. Payne and Elizabeth R. Batman. From a judgment for plaintiffs, and for Elizabeth R. Batman on her cross-complaint, defendant Moses D. Payne appeals. *Reversed.*

J. P. Allee, T. T. Moore and R. P. Carpenter, for appellant.

S. A. Hays and J. H. James, for appellees.

COMSTOCK, J.—This action was brought by the appellees, Charles E. Moore and Mary L. Moore, husband and

wife, and partners in the business of publishing a newspaper and conducting a printing office in the town of Roachdale, Putnam county, Indiana, against appellant and Elizabeth R. Batman, to recover damages claimed to have been sustained by the appellees by reason of the appellant and appellee Batman, or the appellant with the knowledge and consent of appellee Batman, unlawfully, wilfully, and wrongfully excavating and removing the support of a certain wall which formed the east wall of the building used and occupied by appellees as a printing office, thereby causing said wall to fall into the room occupied by appellees, and upon and over the presses, machinery, and tools belonging to appellees, to their damage in the sum of \$2,000. Elizabeth R. Batman filed her cross-complaint against her codefendant Payne for damages to building by reason of the same facts. The complaint was in three paragraphs. The cause was put at issue as to the complaint and the cross-complaint, and upon trial by jury a verdict was returned in favor of the appellees Moores for \$1,500, and in favor of appellee Batman upon her cross-complaint for \$125, upon which judgments were duly rendered. It does not appear upon which paragraph the verdict was rendered.

The first specification of error discussed is the action of the court in overruling appellant's demurrer for want of facts to the first paragraph of the complaint. Said paragraph is as follows: Plaintiffs say that "on the — day of June, 1901, the plaintiffs were in the legal and peaceable possession, as lessees, of a certain one-story brick building, situate on part of lot number twelve, block number four, in the town of Roachdale, Putnam county, Indiana, in which they were then, and for some months prior thereto had been, carrying on the business of printing and publishing a newspaper and operating a news and job printing office; that on or about the — day of

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June, 1901, the said defendants, Payne and Batman, unlawfully and without right, entered upon the lot adjoining the said premises so occupied by these plaintiffs, and wrongfully and without right dug and excavated the earth near and adjoining to the building so occupied by these plaintiffs, and unlawfully and purposely destroyed the support of the brick wall which formed the east wall of the building so occupied by these plaintiffs, thereby purposely, wilfully, wrongfully, and unlawfully causing said brick wall to fall and to be thrown down and into the room then and there occupied by these plaintiffs, upon and against and over the machinery, type, tools, and materials then and there contained in said room, and then and there the property of these plaintiffs, then and there and thereby breaking, damaging, and destroying said machinery, tools, paper, and other material belonging to these plaintiffs, and then and there and thereby damaging and injuring the plaintiff in the sum of, to wit, \$1,500, for which plaintiff prays damage and all other proper relief."

It is urged against this paragraph that the building occupied by appellees was upon the edge of the adjoining lot, and that under such allegation neither the landlord nor tenant would have an easement in the adjoining lot for support until the building had stood and had the advantage of the support for twenty years. *Moellering v. Evans*, 121 Ind. 195, 6 L. R. A. 449, is cited in support of this claim. See, also, *Bohrer v. Dienhart Harness Co.*, 19 Ind. App. 489. Appellees meet this objection with the statement that the case cited is not applicable "to a party wall built as in this case, one-half on each of the adjoining lots, each adjoining proprietor owning one-half of the wall, and having an easement for lateral support in the other half." The paragraph in question herein contains no averment showing that the wall is a party wall and standing one-half on each of the adjoining lots. The case cited is decisive of the question. It

is proper to add here that there is no allegation that the work was done negligently or carelessly. The demurrer should have been sustained.

The second and third paragraphs of the complaint allege that the wall in question was a party wall between the properties of appellant and appellee Batman; that the appellant did the excavating, which caused the wall to fall, upon his own property, with the knowledge and consent of appellee Batman, and that under such facts appellant would not be liable for the injury of the property of appellees. The consent of appellee Batman to the acts of appellant could not affect the right of appellees Moores to recover for damage to their property.

It is next urged that the court erred in sustaining appellees Moores' demurrer to the second paragraph of the appellant's answer to the complaint. The second paragraph of appellant's answer seeks to answer each and all of the paragraphs of plaintiffs' complaint, and sets up an agreement in connection with the purchase of the two and one-half feet of ground by appellant from appellee Batman, that the wall, one-half of which stood on the ground so purchased, should be and become a party wall, and that appellant should have the right to use said wall as a party wall, to build onto the same, extend the same, and do such other things as he would have a right to do in connection with a party wall of which he was one of the proprietors. The averments of the second paragraph of answer as to appellant's rights in connection with said wall do not show that anything was added to his right to destroy said wall, or that his liability as fixed by law was in anywise limited. He had the right, as one of the proprietors, to build to said wall or use the same in connection with his building, but not to destroy the same or interfere with the use of the same by the other owners. He had a right to do these things so long as he did not injure the other owners. As the court said in *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545,

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"he must insure the safety of the operations." That the appellees had knowledge of such agreement and did not interfere with the appellant in doing the work could not relieve appellant from liability. If the wall was a party wall and appellant owned one-half of it, and owned the lot on which he has making excavations, appellees Moores had no right to interfere with or to enjoin his work, but they had a right to assume that he would keep within his legal rights and not disturb the building occupied by appellees or destroy their property. Neither were they required to anticipate that appellant would deprive that part of the wall, which they held under their contract with appellee Batman, of the easement of lateral support to which it is entitled, and abandon their lease and remove their property from the building to prevent its destruction. On the contrary, knowing that the right to use said wall and build did not carry with it the right to destroy it, and that the appellant was bound at his peril not to disturb it to their injury, appellees were not bound to abandon said premises to protect their property. Besides the material facts set up in said paragraph were provable under the general denial, which was filed, and the error, if any, was therefore harmless.

It is contended that the court erred in sustaining objections to certain questions propounded to various witnesses, and in admitting certain evidence over the objection of appellant, and in giving certain instructions to the jury; and that the amount of the recovery is too large. Appellees insist that neither the evidence nor the instructions are in the record, and that in the discussion of these points the rules of the court are not complied with by proper references to the record showing the rulings of which appellant complains.

The judgment must be reversed for the first error discussed, and as the other questions may not arise upon a second trial they are not considered.

As against appellee Batman, appellant assigns as errors that the court erred in overruling his demurrer to her cross-complaint, and in overruling appellant's motion for a new trial upon the issues formed upon said cross-complaint. The appellee Batman filed a cross-complaint against the appellant, claiming damages on account of the injury to said building caused by the falling of said party wall, and the appellant filed a cross-complaint against his codefendant Batman in which he alleged the purchase from said Batman by appellant of two and one-half feet of ground, including one-half of said wall, and as a part of the consideration of such conveyance said Batman then and there released to the appellant the right to construct said wall and said buildings as in his judgment he deemed best; that appellant and said Batman should each keep in repair and maintain one-half of said wall and that each should have an equal right to use the same and alleging the destruction of said wall without fault of appellant, and the rebuilding of said wall by the appellant, for the joint use of appellant and appellee Batman, at an expense of \$500, and asked judgment against his codefendant for one-half the cost of rebuilding said party wall. The first-named specification is not discussed, and under the rule is therefore waived.

The causes for a new trial relate to the evidence and the instructions of the court. It is claimed by appellee Batman that the instructions are not properly in the record because it does not appear by proper order-book entry that they were filed, and that therefore they can not be considered. An examination of the record sustains this claim. Instructions relating thereto can not be considered.

It is also claimed that the evidence is not in the record. The precept is as follows: "The clerk of said court will prepare and certify a full, true, and complete transcript of all the proceedings, docket entries, motions, instructions asked, given, and refused, bills of exceptions, and all papers and affidavits on file, together with the motion for a new

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trial, and evidence, and judgments, and to certify the original manuscript of evidence in the above-entitled cause, to be used on an appeal to the Appellate Court of the State of Indiana."

It is claimed that the precipe directs the clerk to certify all the bills of exceptions and original manuscript of the evidence, and that he could not do this without copying them; that the transcript does not purport to contain copies of either, but attempts to make the original bill of exceptions, embracing the evidence, a part of the record, without copying, and that this could not be done by following the directions of the precipe. The clerk certifies that the foregoing precipe "is a full, true, and complete transcript from the records in my office of all the pleadings, papers, entries, order-book entries, records, affidavits, bills of exceptions, and evidence, and bills of exceptions embodying the evidence, together with the motion for a new trial, instructions, and all other motions and orders given in said cause.

* * * That after said trial, at the request of John P. Allee, the attorney for Moses D. Payne, defendant in said cause, said reporter on the 19th day of February, 1902, filed in my office her original longhand manuscript of said shorthand notes of said evidence, which longhand manuscript was duly certified to by said reporter, and that afterwards said longhand manuscript of said evidence was on the 19th day of February, 1902, embodied and incorporated in a bill of exceptions by said defendant, which, after being duly certified and signed by Presley O. Colliver, judge of said court, was on the 19th day of February, 1902, filed by said defendant in my office; that said longhand manuscript of the evidence in said cause, embodied in said bill of exceptions so filed as aforesaid in my office, is the same longhand manuscript thereof filed in my office by said official reporter before the same was embodied in said bill of exceptions, and that said bill of exceptions so embodying the evidence in said cause was filed in my office by said defend-

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ant on the 19th day of February, 1902, and within the sixty days limited therefor by said court." In the face of this certificate we can not say that the original manuscript of the evidence is not embraced in the bill of exceptions. The evidence is in the record.

J. W. Blades testified, on behalf of the cross-complainant, that, as her agent, he did not give his consent to the appellant to make the excavation. Cross-complainant Batman, in her own behalf, testified that she did not give her consent to the appellant to make the excavation. To meet this testimony the appellant testified that he had the consent of Mrs. Batman to make the excavation as he did. James E. Edwards was present at the time of the purchase of the wall, and knew the conditions. Appellant offered to prove by him that Mrs. Batman at the time the deed was made gave her consent for him to make the excavation as part of the consideration of the purchase. The evidence was excluded and exception taken. We think this evidence should have been admitted, not only to corroborate appellant's own testimony, but because the cross-complainant had offered the issue in her pleadings and in her evidence.

The judgment is reversed, with instructions to the trial court to sustain the demurrer to the first paragraph of the complaint, and to sustain appellant's motion for a new trial as to the cross-complaint of appellee Batman.

ON PETITION FOR REHEARING.

COMSTOCK, J.—Appellees Moore and Moore ask a rehearing in this cause upon the alleged error of the court in holding that the first paragraph of the complaint did not show a cause of action. The holding was upon the authority of *Moellering v. Evans*, 121 Ind. 195, 6 L. R. A. 449. The case was cited by appellant, and the argument against the sufficiency of the paragraph based upon said case. Appellees met the argument with the claim that that case, to

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quote from appellees' brief, "was not applicable to a party wall built, as in this case, one-half on each of the adjoining lots, each adjoining proprietor owning one-half of the wall and having an easment in the other half." This position was fairly taken as an admission that if the paragraph did not show that the wall in question was a party wall, the case was controlling. It did not show such fact, and the reason upon which appellees contended the case was not applicable failed.

But counsel insist that the averments of this paragraph that defendants negligently and unlawfully did the excavation that caused plaintiff's building to fall are sufficient to make it good. The characterization of the acts without averments showing that the acts were unlawfully done is not sufficient. The purpose of a party in doing a particular thing is not material, if he had the right to do it.

Appellee Moore testified, over appellant's objection, in his examination in chief, to the value of different items of property in question, by reference to an invoice made by himself and his wife with a view of selling a half interest in the same to a third party, the prospective purchaser taking no part in the invoice. Upon cross-examination, appellant propounded to him the following questions: "I will ask this witness to state on your cross-examination, in reference to the value that you fixed on this type that you had on hands at the time that this building fell, what was the fair market value of that type that you had on hands at that time, if placed on the market for sale, without any reference to the list price?" "Now, then, do you know, without reference to the figures, that you testified from here—do you know what the fair market value, without any reference to any list price or any figures you made—the fair market value of all that type that you had on hands at that time?" "Now, then, will you tell this jury, without any reference to any inventory or price lists, if that engine was put on the

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ant on the 19th day of February, 1902. . . . et value of that sixty days limited therefor by said co. . . . "Then, it was a this certificate we can not say that . . . ow, then, Mr. Moore, of the evidence is not embrace . . . you spoke about in your The evidence is in the recor. . . . ond-hand engines, or the list

J. W. Blades testified.

that, as her agent, he . . . engines or new engines, what would you want to make the e . . . value of that engine was, if placed on her own behalf . . . the 19th day of last June?" "In the appella . . . estimate on yesterday of the values of money th . . . from what source did you get the value, Batr . . . Did you take it from figures or from an in-

we . . . "It is listed at \$550?" In response to the follow-

ing question propounded to him on his cross-examination: "Now, then, you may tell the jury, if you know, what the fair market value of that press was at the time that this building fell, if placed on the market. Tell the jury what it was." To each of the foregoing questions the court sustained appellees' objection. The questions were proper upon cross-examination, and the court erred in excluding them.

Petition overruled.

Roby, J., concurring.—I think the questions set out should have been answered, and concur in the result reached.

INDIANA NATURAL GAS & OIL COMPANY v. VAUBLE.

[No. 4,452. Filed October 6, 1903.]

MASTER AND SERVANT.—Defective Appliance.—Knowledge of Master.—Complaint.—A complaint for personal injuries received by plaintiff while assisting in the laying of a pipe-line, under the direction of a foreman, which alleges that the injury occurred because of the weak and insecure condition of the blocking and scaffolding constructed by defendant's superintendent and foreman, is sufficient without alleging specifically that the defendant had knowledge of the defects. p. 373.

SAME.—Defective Appliance.—Knowledge of Servant.—Instruction.—When Defective Instruction Not Cured by Others.—In an action by a servant

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for injuries sustained while in the employ of defendant in the laying of a pipe-line, charging that the cause of the injury was defective construction of certain blocking and scaffolding, an instruction which undertakes to enumerate certain facts which, if found, will authorize a verdict for plaintiff, is erroneous if it makes all reference to plaintiff's knowledge or means of knowledge of the defects; and such instruction is not cured by another instruction which states the law correctly. pp. 374, 375.

From Fulton Circuit Court; *Charles Kellison*, Special Judge.

Action by Henry Vauble against the Indiana Natural Gas & Oil Company. From a judgment for plaintiff, defendant appeals. *Reversed*.

W. O. Johnson, H. A. Steis, M. M. Hathaway, G. W. Holman and R. C. Stephenson, for appellant.

ROBINSON, C. J.—Suit for personal injuries. The complaint avers: That appellant was engaged in laying a ten-inch pipe-line which was made up of large joints of pipe weighing 800 to 1,000 pounds, and joined together at the ends with a coupling, requiring the assistance of a number of men; that appellee was in appellant's employ as a tongsman, his duty being, under the supervision of a superintendent and foreman, to use a pair of tongs and assist in coupling together the joints of pipe, and laying the pipes after put together; that in laying the line across the Tippecanoe river a temporary trestle or staging had been constructed upon which the joints were placed and fastened together preparatory to being lowered to the bed of the stream; that in the performance of this work, and under the direction of a superintendent, appellee and other employes working under the immediate direction of two foremen had carried onto the staging several joints of pipe and placed them on blocking placed by appellant to receive them, and had fastened the joints together, when, in the opinion of the superintend-

ent, it became necessary to remove a joint of the pipe, because defective; and to do this one of the foremen ordered appellee and others to move the pipe across to the other side of the staging; that while appellee and other employes were moving the pipe under the command and immediate direction of the foreman who had control and direction of the men, owing to the great weight of the joints of pipe resting on the blocking, and owing to the careless, negligent, defective, and insecure manner in which the blocking had been arranged and placed, such supports or blocking slipped, broke, and fell, letting the pipe and staging or blocking fall, and, in falling, the pipe and blocking fell upon appellee's foot and leg, injuring the same; that the fall of the pipe was because of the want of care, the ignorance and incompetence of the foremen and superintendent under whose immediate supervision and direction the blocking and scaffolding for the support of the pipe had been placed, "and in so carelessly placing it that it was weak and insecure, and in carelessly and unskilfully directing and ordering said pipe moved while resting on such insecure and weak supports; that the insecure and weak nature of the blocking placed to receive said pipe, and upon which it rested, being at the time unknown to the plaintiff at the time it fell, but was known to the defendant's foremen, Carr and Hart, and to the superintendent Nelson, or could have been known by them by the use of ordinary care and observation, and the fall of said pipe, and the consequent injury to the plaintiff, would not have occurred but for the carelessness and negligence of the defendant's superintendent and foremen in attempting to remove said pipe while on such insecure supports. Wherefore the plaintiff avers that the accident and injury so as aforesaid sustained by him were caused by the fault and negligence of the defendant, its superintendent and foremen, as aforesaid, and without fault or negligence on his part."

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The pleading charges that the injury occurred because of the weak and insecure condition of the blocking and scaffolding constructed by appellant's superintendent and foremen for the support of the pipe. It is not the theory of the pleading that the material used in the construction of the blocking and scaffolding contained some latent defect which was known or could have been known to appellant, but that the blocking and scaffolding constructed to receive the pipe was weak and insecure from some cause not stated. It was this "insecure and weak nature of the blocking placed to receive the pipe" which was known to appellant's foreman and superintendent and unknown to appellee. It can not be said that the facts averred disclose that appellee had the same means and opportunity of knowledge as appellant had. It is not only averred that appellant's superintendent and foremen had knowledge of the weak and insecure nature of the blocking, but also that it was constructed under their immediate supervision and direction. The facts pleaded do not disclose an obvious defect or danger open to ordinary careful observation. It is not averred that appellee had no knowledge of the danger, and it is true that the averment of the want of knowledge must be as broad as the averment of knowledge on the part of appellant. But it is not averred that appellant knew the blocking and scaffolding were in danger of falling, and negligently failed to notify appellee of the danger. The charge is not that the blocking and scaffolding had, from some cause, become weak and insecure, but that appellant, by its superintendent and foremen, had constructed weak and insecure blocking and scaffolding for the support of the pipe. It would necessarily follow from this averment, without a direct averment to that effect, that appellant had knowledge of this weakness and insecurity. And it is averred that appellee did not know that the blocking and scaffolding were weak

and insecure. The complaint states a cause of action. *Big Creek Stone Co. v. Wolf*, 138 Ind. 496.

Complaint is made of the eighth instruction given to the jury: "Should you find and conclude from an examination of all the evidence in the case that the plaintiff has established and proved all the material allegations of his complaint, and that he has shown that he was in the employ of the defendant company, and that he was engaged in the work of the defendant, and in the line and scope of his duty at the time he received the injury complained of, and that such injury was occasioned by the falling of an iron gas pipe and its supports upon his foot and leg in the manner complained of, and that the fall of such pipe and subsequent injuries was occasioned by the giving way of the blocking or supports placed under said pipes, and that the blocking or supports was arranged and placed under the pipe by and under the direction of the defendant's superintendent, foremen, or boss having control and direction of the plaintiff at the time; and you further find that through the ignorance, want of skill, incompetence, negligence, or carelessness of such superintendent, foremen, or boss, the blocking and supports placed under said gas pipe was insufficient, or so carelessly placed and arranged that it was insufficient to support said gas pipe when being moved thereon under the direction of such superintendent, foreman, or boss, and that by reason thereof said supports and blocking fell over or slipped from position, and allowed the gas pipe, or the supports or blocking, to fall upon the plaintiff's leg or foot, by which the plaintiff was lamed and injured as complained of; and if you further find that the giving way or falling over of the blocking and supports and the fall of the pipe and injury to the plaintiff was not brought about or in any manner caused by the carelessness or negligence of the plaintiff, then your verdict should be for the plaintiff, and you should assess," etc.

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An essential averment of the complaint was that appellee had no knowledge of the weak and insecure condition of the blocking and scaffolding. Such an averment repels not only actual knowledge, but also any implied knowledge. *Evansville, etc., R. Co. v. Duel*, 134 Ind. 156. But to sustain such an averment appellee was required to prove not only that he had no knowledge of this defective condition, but also that he could not have known it by the exercise of ordinary care. If he did know it, or could have known it by the exercise of ordinary care, and voluntarily continued in the work, he assumed the risk. *Consolidated Stone Co. v. Summit*, 152 Ind. 297; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531; *Cleveland, etc., R. Co. v. Parker*, 154 Ind. 153; *Chicago, etc., R. Co. v. Glover*, 154 Ind. 584.

The instruction undertakes to enumerate certain facts which, if proved, will authorize a verdict in appellee's favor. It omits appellee's knowledge of the weak and insecure condition of the blocking and scaffolding. It plainly directs the jury to find for appellee if the facts enumerated were proved. Under this instruction, appellee would be entitled to a verdict, even though he had full knowledge of the defective condition of the blocking, or could have had such knowledge by the exercise of ordinary care. Such an instruction is not cured by another which correctly states the law. It can be corrected only by withdrawing it from the jury. *Chicago, etc., R. Co. v. Glover, supra*.

The motion for a new trial should have been sustained. Judgment reversed.

THOMPSON v. JAMISON ET AL.

[No. 4,351. Filed October 6, 1903.]

WILLS.—Construction.—Life Estate.—A testator by three separate items of his will devised certain portions of his real estate to his three daughters “for and during the lifetime” of each respectively, and provided that upon the death of the daughters the lands were to go to their respective children in fee simple. Another item of the will provided that in the event one of the daughters should die leaving no child or children the lands devised to her should go to the children of the surviving daughters. *Held*, that the fact that one of the daughters was childless did not, under the will, give her a fee simple in the lands devised to her, and that she, as the other daughters, received but a life estate.

From Jackson Circuit Court; *T. B. Buskirk*, Judge.

Suit by Hettie K. Thompson against Louisa H. Jamison and others. From a judgment for defendants, plaintiff appeals. *Affirmed*.

B. H. Burrell, J. C. Lawler and H. H. Prince, for appellant.

B. E. Long, B. E. Long, Jr., Ralph Applewhite, J. F. Applewhite and Frank Branaman, for appellees.

WILEY, J.—Appellant was plaintiff below, and brought her action against appellees to quiet title to certain real estate. Her complaint was originally in three paragraphs, to each of which demurrers for want of facts were sustained. Subsequently appellant dismissed the second paragraph. Sustaining the demurrers to the first and second paragraph is assigned as error.

The complaint avers that appellant and appellees, Elizabeth Thompson and Louisa H. Jamison, were the daughters of Waller Harrell, deceased, and that Esther C. Harrell was his widow, and that they were his sole heirs; that the said Waller Harrell died testate, and a copy of the will is filed as an exhibit.

By the will the testator gave to his wife all of his personal property and the rents and profits of all of his real

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estate during her life. He then made bequests to his three daughters, as follows: "Item 2. I will and bequeath to my daughter Elizabeth Thompson for and during her natural life the following real estate [a description of it follows], and at the death of my said daughter the said lands are to be divided among her children then living to share and share alike, to be theirs in fee simple. Item 3. To my daughter Hettie K. Thompson I will and bequeath for and during her natural life the following lands *

* * to hold the same during her natural life and at her death the same to be divided among her children then living, in fee simple, to share equally, viz.: [Description of the lands follow.] Item 4. To my daughter Louisa Harrell [now Jamison] I will and bequeath the following real estate * * * for and during her life, and at her death the same to be divided equally among her children then living, if any, in fee simple, viz.: [Description of lands follow.]" A subsequent provision of the will is as follows: "In case either of my daughters die leaving no child or children the lands bequeathed to her in that event shall go to the children of the surviving daughter or daughters."

The complaint alleges that the widow renounced the will, as to her, and elected to take under the statute, and thereupon filed a petition in the Jackson Circuit Court for partition, and such proceedings were had as that certain of the lands described in the will were set off to her in fee simple. It is then averred that the partition did not affect the lands of appellant, except that it took a proportionate share of hers, together with those of her sisters, to make up the acreage set off to her mother. It is then averred that by the will the testator intended to, and did in fact, bequeath to appellant the real estate described in her complaint, in fee simple; that appellees are asserting some claim adverse to hers; and that she is entitled to have her

title quieted. There is no substantial difference between the first and third paragraphs of complaint.

The facts are well pleaded, and the single question for decision is, what estate did the appellant take under the will? If a life estate only, the lower court properly sustained the demurrer to the complaint. We have set out all of the important provisions of the will, to the end that the intention of the testator might more clearly appear. The fact that the widow elected to take under the law, does not affect the rights of the other legatees, for it is shown that they accepted the provisions of the will and took possession of their respective lands after the widow had had partition. The intention of the testator is clearly and explicitly expressed, and it is manifest that he intended to vest in his daughters a life estate only, the fee to rest in their respective children. It is also equally plain that he intended that, in the event either of his daughters should die without issue, the portion of the real estate bequeathed to her should go to the children of the other daughter or daughters.

Counsel for appellant urge that if this construction is given the will it would result in a partial intestacy as to the lands bequeathed to the appellant, "for the reason that what is attempted to be a residuary clause following item four, only disposes of the land or title given this daughter (appellant), and if it should stand alone and only be a life estate, and with the death of the legatee the title thereto ends, and, if no title, none could pass." This position is not tenable. The testator by his will creates and vests two titles—a life estate in appellant, and the fee simple in her children, if she has any at her death, and, if not, the fee goes to the children of her sister or sisters. In other words the children are given the fee, subject to the life estate of the daughters. One rule of construction is that a testator will not be presumed to have intended partial intestacy unless the language of the will compels such

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construction. *Korf v. Gerichs*, 145 Ind. 134; *Borgner v. Brown*, 133 Ind. 391; *Spurgeon v. Scheible*, 43 Ind. 216; *Cate v. Cranor*, 30 Ind. 292.

In this case, under the plain language of the will, to hold that the testator intended partial intestacy would be a strained construction, and not permissible under the rule stated. Section 2737 Burns 1901 provides: "Every devise, in terms denoting the testator's intention to devise his entire interest in all his real and personal property, shall be construed to pass all of the estate in such property." In the will before us, it is manifest that the testator intended to dispose of all of his estate, both real and personal, and the language is so plain that there can be no doubt but what he disposed of it according to his best judgment. There being no uncertainty about it, and the disposition appearing equitable and just, that intention should be respected. In the case of *Cain v. Robertson*, 27 Ind. App. 198, the exact question here under consideration was involved, and decided adversely to appellant's contention. Under the authorities, appellant was only given a life estate, with a remainder over.

Judgment affirmed.

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[No. 4,435. Filed October 8, 1903.]

BILLS AND NOTES.—Guarantor.—Indorser.—Instruction.—In an action against one whose *prima facie* liability is that of a guarantor, an instruction to the jury that if they shall find from the evidence that defendant placed his name upon the back of the note merely as an indorser, they must find for the defendant, is erroneous; it being necessary that the jury also find, in addition to the fact that the appellee was an indorser, some valid defense releasing him from liability. pp. 382, 383.

SAME.—Action on Note.—Instruction Not Within the Issues.—In an action to recover the amount of a promissory note from one whose *prima facie* liability is that of a guarantor, an instruction to find for the

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defendant, if the evidence showed that it was agreed when the note was signed that the defendant should not be held liable, is erroneous, where no such defense was pleaded. *pp. 382, 383.*

From Laporte Circuit Court; *J. C. Richter*, Judge.

Action by Gideon A. Price against J. O. William Lonn. From a judgment for defendant, plaintiff appeals. *Reversed.*

M. R. Southerland and *R. C. Busse*, for appellant.

E. E. Weir, *L. Darrow* and *E. H. Garnett*, for appellee.

HENLEY, J.—Appellant commenced this action against appellee upon a promissory note. The note was an Illinois contract, and, as such, governed by the laws of that State. The note was dated August 2, 1899, signed by the Juniper Remedy Company, and was payable to the order of the Schroeter Manufacturing Company on demand. J. O. William Lonn indorsed the note before its delivery by writing his name across its back. Afterward it was assigned and indorsed by the Schroeter Manufacturing Company to appellant. Appellee's answer was in five paragraphs. In the first paragraph of answer it is alleged that the note was signed under a special agreement with the payee that the appellee was to be held as an indorser and not as a guarantor. The second paragraph is a verified general denial. The third paragraph alleges that appellee indorsed the note for the accommodation of the maker of the note, the payee having full knowledge of the same, and of the further fact that there was no consideration for the acceptance or indorsement of said note going to or received by appellee, and that appellant received the note long after its maturity, with full knowledge of all said facts. The fourth paragraph alleges that appellee did not execute the note sued on in the capacity of guarantor, but that he signed the same under an agreement that he should be held only as an indorser, and that

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under the law of Illinois, as set out in said answer, he is discharged because the note was not protested for nonpayment, and notice of the protest and nonpayment given to the indorser. The fifth paragraph of answer averred that the law of the state of Illinois, where the note sued upon was executed, as expressed by the decisions of the supreme court of said state in relation to notes of the character sued upon in this action, was that the date of the execution of said note, and now is, as follows, to wit: That notes payable on demand mature and become due immediately upon delivery; that the statute of limitations commences to run against the same on the date of execution; that to protect a person taking a note payable on demand, against equities, such person must take the same within a reasonable time after its execution; that the person so taking it, whether by indorsement or delivery, takes the same dishonored; that any time in excess of thirty days is an unreasonable time within which a note payable on demand, and under the decisions of the supreme court of Illinois, can be taken, without the same being dishonored; that in all cases where diligence is not used in the presentment of such note, and the same is dishonored, the guarantor is discharged, if injury and damage results by reason of the laches of the holder; that, under the laws of the state of Illinois, a guarantor who is compelled to pay a note for his principal has a right of action against his principal for the money so paid; that the note sued on in this action was delivered on the date of its execution, as shown by the date on the face of the same; that no demand was made of this defendant for the payment of the same for more than six months after its delivery; that the appellant did not obtain the same for more than six months after its execution; that at the time of the execution of this note the principal on the note, to wit, the Juniper Remedy Company, was solvent and abundantly able to pay all of

its debts; that since the execution of this note, and before the commencement of this action, but at a period of more than thirty days after the execution of said note, the Juniper Remedy Company became insolvent, and had no property subject to execution out of which any claim against it could be made; that at the time the plaintiff took and accepted said note from the Schroeter Manufacturing Company the same was dishonored; that by reason of the failure of the Schroeter Manufacturing Company to present said note to the Juniper Remedy Company within a period of thirty days from the date and delivery of the same (appellee) was rendered unable to make his claim out of the Juniper Remedy Company; and that by reason of all the facts hereinabove set forth appellee is, under the laws of the state of Illinois, fully and finally discharged from liability of said note. Each paragraph was attacked by demurrer. The ruling of the trial court in holding sufficient each of the first, third, fourth, and fifth paragraphs of answer is assigned as error.

It is conceded that under the law of Illinois the liability of appellee in this case was *prima facie* that of a guarantor, and that he could be sued without joining any of the other parties to the instrument as defendants. The brief abstract of each paragraph of the answer shows the defenses relied upon, and the issues presented. We do not deem it important to discuss any question arising upon the pleadings. The judgment of the trial court must be reversed because of an erroneous instruction.

Under the assignment of error that the trial court erred in overruling appellant's motion for a new trial, it is contended that the following instruction given by the court to the jury is erroneous, viz.: "The court instructs the jury, as a matter of law, that if they find from all of the evidence that at the time the defendant J. O. William Lonn placed his name on the back of the note sued on, it was agreed that he signed it as indorser, or if it was agreed

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that the defendant J. O. William Lonn was not to be held liable for the payment of the amount of the note, then the jury should find for the defendant." Even if the jury, under the evidence, could have found that appellee was an indorser of the note sued upon, that fact alone would not have relieved appellee from liability. It was necessary that the jury also find, in addition to the fact that the appellee was an indorser, some valid defense releasing him from liability as such indorser. The latter part of the instruction is also bad. There could have been no evidence admissible under the issues presented to which this part of the instruction would be applicable. No one of the defenses presented by the answers is based upon an agreement that at the time the note was signed the parties agreed that J. O. William Lonn should not be held liable in any way. The instruction is not within the issues, and it is not within any evidence admissible under the issues.

The jury may have accepted the testimony of appellee that it was agreed at the time of the execution of the note that he was not to be held in any capacity thereon, and, under the instruction of the court, returned a verdict in his favor. The case of *Shirk v. Mitchell*, 137 Ind. 185, 196, is very much in point here. The Supreme Court in that case say: "It is quite apparent that the last two instructions are not applicable to any evidence which was admissible under the issues in this case. It is established by a long line of decisions that a party must recover, if at all, upon the facts stated in his pleadings. It would be dangerous practice, subversive of legal principles, to permit a party to plead that a note was executed for the purchase money of an engine, and make no complaint as to the fairness of the transaction of purchase, and then defeat the action by proof that he had been induced to enter into such contract through the fraud of the seller. As answer of fraud is essentially and radically different from an answer of breach of warranty, and there

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is nothing in the answer or cross-complaint in controversy which would give the appellants an intimation, before the trial, that the fairness of the transaction, in which Michener sold the engine to the appellees and they executed their notes, would be questioned. The case should have been tried upon the issues made by the pleadings. 'It has often been decided that every pleading must proceed upon some single, definite theory, and that a party must stand or fall upon the theory of his case as he presents it in his pleadings.' "

The jury, under the evidence introduced in support of the issue made by the complaint, the fifth paragraph of answer, and reply thereto, might have properly returned a verdict in appellee's favor, but we have no way of determining from the record whether or not the verdict is based upon the issue supported by the competent evidence.

Other alleged errors discussed by counsel may not appear upon another trial of this cause.

The motion for a new trial ought to be sustained. Judgment reversed, with instruction to the trial court to sustain appellant's motion for a new trial.

ROBINSON v. FOUST, ADMINISTRATOR.

[No. 4,453. Filed October 8, 1903.]

HUSBAND AND WIFE.—*Wife not Required to Support Husband.*—A wife is under no legal obligation to support her husband, nor to pay out of her separate property, the expenses of her husband's last sickness and funeral expenses. pp. 387, 388.

SAME.—*Wife's Agreement to Pay Expenses of Husband's Last Sickness.*—A husband was sick and unable to support himself. His wife upon the promise of her husband's grandfather to make certain provision for her out of his estate supported her husband out of her own separate means until his death. *Held*, that the agreement formed the basis of a valid claim against the grandfather's estate. pp. 388, 389.

From Montgomery Circuit Court; *Jere West*, Judge.

Robinson v. Foust.

Action by Emma Robinson against John M. Foust, administrator of the estate of Aaron Foust, deceased. From a judgment for defendant, plaintiff appeals. *Reversed.*

Benjamin Crane and A. B. Anderson, for appellant.

W. T. Whittington, W. A. Whittington and W. P. Britton, for appellee.

ROBINSON, C. J.—Appellant filed a claim against the estate of appellee's decedent, averring, in substance: That in 1880 she was married to Edward A. Kelsey, a grandson of decedent Aaron Foust, and lived with him as his wife until his death on the 14th day of February, 1886, leaving appellant as his only heir. Edward was the only child and heir of Catherine Kelsey, who died in November, 1864, prior to the death of her father, Aaron Foust, leaving Edward, who was about eighteen months old, whom decedent took into and maintained in his family until he was about six years old, regarding him as a son, and declaring and intending that he should have a child's portion of his estate. At the time of her marriage appellant was given \$50 in cash and \$150 in personal property by her father. In the fall of 1884 her husband became sick of consumption, and died February 14, 1886. When he became sick he was without any money or property of any kind or means of support, and was unable to work or in any way support himself or appellant, and was soon confined to the house and to his bed, and so continued until his death. In the spring of 1885 appellant had the personal property given her by her father, and some \$200 or \$300 in other property her father had given her. Aaron Foust frequently visited Kelsey while sick, and often requested appellant to provide for him, and to furnish him out of her means with provisions, fuel, and medicines, and pay the rent of the house, and during the last few weeks of Edward's life to provide attendants for him, and promised

her that if she would do this he would help her as far as he then could, and that he would see to it that she was amply paid therefor, and would make suitable provision for her at his death. Appellant, relying on these promises, and induced thereby, expended all of her means and property in paying for the support and maintenance of her husband and in providing provisions, fuel, and medicines, and paying rent from February, 1885, until her husband's death. Again in January, 1886, Aaron Foust promised appellant that if she would continue to support her husband, and provide him with provisions, fuel, medicines, rent, and attendants, as she had been doing, he would pay her for what she had already paid out and expended and might thereafter expend, and would make provision for her out of his estate. That on that day, in order to evidence such promise, Aaron Foust executed the following instrument: "At my death I promis my granson E. A. Kelsey that his wife shall be paid from my estate \$3,500, if living. [Signed] Aaron Foust." Afterwards on the same day Aaron Foust proposed to pay the doctor's bill and funeral expenses, and in that event the amount thereof should be deducted from the \$3,500 mentioned in the foregoing instrument, and as evidence of such promise executed the following: "Crawfordsville, Indiana, January 25, 1886. I, Aaron Foust, her in prisent of friends and witnes promis my granson Edward A Kelsey that at my death his wife if living shal have all due him the same as if he was living after his Dr. Bil and Furnel is taken out. sign. Aaron Foust. Witness, Albert Kelsey, Witness, M. Fahey, Witness, Susan E. Coleman. Written by Mike Fahey."

Both instruments were on that day delivered to appellant's husband. That appellant, induced by these promises, expended her property and money in the support of her husband during the year of 1885 and until the time of his death, and in so doing expended all of her property ex-

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cept a part of her household goods; and at the request of appellee's decedent, and relying upon and induced by the above promises, appellant's father, at her request, paid the house rent for many months, and paid for an attendant during the last few weeks of her husband's life. Prior to and at the time of the execution of the above instruments decedent promised appellant that for what she had done and might thereafter do in supporting her husband she would be paid, and that he intended that she should have out of his estate at his death the sum of \$3,500. At that time and at the time of his death Aaron Foust owned property of the value of \$26,000, which he disposed of to others, making no provision whatever for appellant.

The rule of the common law that the husband and wife could not deal together rests upon the theory that in legal contemplation the husband and wife are one person, and not upon the theory that the wife is under a legal disability. This rule still prevails except where the legislature has expressly modified or annulled it, and the question is not whether disabilities have been removed, but whether the rule has been annulled. The common law status of husband and wife very plainly denies to both the husband and wife a right to compensation for services rendered by either for the benefit of the other. It is quite true that the common law rights and duties growing out of the marital contract have been very materially modified in many respects by statutes. And while the enlightened policy of modern legislation has given a married woman certain rights and powers denied her by the common law, yet these statutory innovations upon the common law have not gone so far as to permit unrestrained commercial dealings between husband and wife. The statutory right of the wife to recover for her own services does not change the relation between husband and wife nor does it exonerate the wife from the performance of any proper services for the benefit of the husband. It is the duty of husband and wife to

protect and care for each other in sickness. This duty, arising out of the married relation, is to be performed in conformity with the mutual obligations assumed when they became husband and wife. The common law and scriptural obligation to be a "help-meet" to her husband still rests upon the wife, and unless she carries on a separate business, or works for others on her own account, her earnings are the property of the husband. *Board, etc., v. Brown*, 4 Ind. App. 288; *Hensley v. Tuttle*, 17 Ind. App. 253; *Kedey v. Petty*, 153 Ind. 179.

Had appellant and her husband entered into a contract that she should be reimbursed out of his estate for money of her own expended for his support, the contract could not have been enforced. *Corcoran v. Corcoran*, 119 Ind. 138, 4 L. R. A. 782, 12 Am. St. 390.

If it be admitted that it was appellant's legal duty as wife to use her own property and means to furnish her husband with the necessities of life, it follows that a promise to reimburse her is without consideration. *Shortle v. Terre Haute, etc., R. Co.*, 131 Ind. 338; *Spencer v. McLean*, 20 Ind. App. 626, 67 Am. St. 271.

But, if it be admitted that it was her legal duty to use her own means for his support, it would follow that her estate must pay a claim of a third person furnishing such support. However, appellant's claim is not for any services rendered her sick husband. The consideration for the promise made for her benefit was not the performance of any wifely duties. Nor is it a question as to the moral and social obligations of the wife to care for and support her sick husband. The extent to which a wife will observe such obligations beyond the discharge of the wifely duties imposed by the marriage relation is a question she must determine for herself. Her personal property, which the common law gave to the husband upon marriage, is now, by statute, hers absolutely. She may do with it as she might do if unmarried. There was no common law

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right of the husband to support out of the wife's property corresponding to the wife's right to support out of her husband's property. And the statute which makes her personal property hers absolutely has imposed no burdens in the husband's favor. She may contract with reference to it as she chooses. *Young v. McFadden*, 125 Ind. 254. There is no statutory provision in this State making the "expenses of the family" and the "education of the children" chargeable upon the property of both husband and wife, or either of them. *Grant v. Green*, 41 Iowa 88. Under the married woman's acts the property she claims to have used was hers as though unmarried, and there is no statute imposing upon her the legal duty to use it in any particular way.

The instrument sued on is in writing, signed by the decedent and contains a promise by the decedent to pay the claimant a sum of money from his estate if she be living at the time of his death. She avers the consideration for this promise. The decedent entertained for his grandson the love and affection of a father, and desired that he be properly provided for in his last sickness. He contracted for the performance of certain acts, and placed an estimate upon their value to him. Nothing is averred to authorize us to disturb that estimate. We can not substitute our judgment for his. The decedent obtained all he contracted for, and the claimant, relying upon the promise as made, performed the conditions agreed upon. See *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16, and cases cited; *Price v. Jones*, 105 Ind. 543, 55 Am. Rep. 230; *Mullen v. Hawkins*, 141 Ind. 363; *Farber v. National, etc., Co.*, 140 Ind. 54; *Ditmar v. West*, 7 Ind. App. 637; *Shover v. Myrick*, 4 Ind. App. 7.

The claim is sufficient against a demurrer. Judgment reversed.

FRANKLIN INSURANCE COMPANY v. FEIST ET AL.

[No. 4,393. Filed October 8, 1903.]

PLEADING.—*Complaint on Fire Insurance Policy.*—*Variance.*—The complaint on a fire insurance policy described the property insured as a dwelling situated on lot number twenty-five in "McTeagert's addition" to a certain city, while the policy showed that the defendant insurance company agreed to insure against loss by fire a dwelling situated on lot twenty-five in "McTeagert's fifth addition to said city." *Held*, that the variance might have been good ground for objection to the introduction of the policy in evidence, but did not make the complaint bad. *pp.* 394, 395.

DEEDS.—*Delivery.*—A delivery of a deed is not effective without an intent on the part of the grantor that it is to be delivered, accompanied by an act to carry out such intent. *pp.* 395, 396.

SAME.—*Execution and Record of Deed Without Knowledge of Grantee.*—*Delivery.*—Where a deed of conveyance was executed and recorded without the knowledge of the grantee, and after record the grantors took possession of the deed and exercised dominion over it, and where the purpose of the grantor was that the deed should not be delivered except upon a certain contingency which did not arise, there was no delivery. *p.* 396.

PLEADING.—*Complaint on Fire Insurance Policy.*—*Reply.*—*Departure.*—To a complaint on a fire insurance policy for damages to a dwelling-house, the defendant insurance company answered that the plaintiff was not the owner of the property insured at the time the policy was issued, and that the policy by its terms was thereby rendered invalid. *Held*, that a reply which admitted that the records in the county recorder's office showed that plaintiff had deeded the property to another, but that the deed was without consideration, had never been delivered, and was made and recorded without the knowledge of the grantee, was not bad as being a departure from the complaint. *pp.* 396, 397.

EXEMPTION.—*Pleading.*—The right of exemption is given only upon contracts express or implied, and when such right is pleaded it must appear that the judgment was of the character entitling the claimant to the exemption. *p.* 397.

From Daviess Circuit Court; *H. Q. Houghton*, Judge.

Action by Catherine Feist against the Franklin Insurance Company and another. From a judgment for plaintiff, the Franklin Insurance Company appeals. *Reversed.*

Franklin Ins. Co. v. Feist.

A. J. Clark and Gardiner & Slimp, for appellant.

C. K. Tharp and John Downey, for appellee Catherine Feist.

COMSTOCK, J.—Appellee Feist sued the appellant Franklin Insurance Company on a fire insurance policy. Appellee the State Building & Loan Association was made a party defendant as a mortgagee of appellee Feist. Said policy was issued on the 5th day of October, 1899, and was to be effective for three years from date. By said policy appellant agreed to insure appellee Feist in the sum of \$600 against damage to a dwelling-house, and to insure her in the sum of \$400 against loss to her personal property located in said dwelling. On the 23d day of May, 1900, the house and personal property were destroyed by fire. The loss on personal property was adjusted at \$200, and paid, leaving the controversy, so far as this appeal is concerned, solely for damage to the house.

The complaint was in one paragraph. A demurrer thereto for want of facts was overruled. The defendant insurance company answered separately in four paragraphs. The first admits the execution of the policy, and that said policy contained a clause stipulating that the loss, if any, under said policy, should be paid to the State Building and Loan Association of Indiana, as its interests may appear; that the building was damaged by fire, and proof of loss made; that the loss on personal property was agreed upon and fully settled, prior to the bringing of the action; that the plaintiff represented that she was the owner of the property in fee simple at the time of the issuance of said policy; that the policy sued on contains the following provision: "This entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void if the interest of the insured be otherwise than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple;" that at the time of the issuance of the policy plaintiff

was not the owner of the property and building covered by said policy, and that she made conveyance of the same November 2, 1896, to one Antonia Feist; that so having conveyed said property prior to the time of the issuance of said policy, plaintiff had no insurable interest in and to the same when said policy was issued, and the conditions as to the title having been violated, the policy was void from the time of its issuance. The second pleads that plaintiff represented that she was the owner of the property described in the policy; that appellant relied upon such representations as to ownership and issued its policy for a premium of \$4.80; that appellant had no knowledge as to the title of the property other than the representations of plaintiff; that the plaintiff had, in fact, conveyed said property before the issuing of said policy, to one Antonia Feist, and was not the owner thereof at the time of the issuance of said policy or at the time said property was damaged by fire. It also pleads the provision as to ownership set out in paragraph one, and brings into court the sum of \$5 for the plaintiff for the premium paid for the execution of said policy. The third pleads payment prior to the bringing of the action. The fourth, that, among other things, it is provided by the terms of said policy, that, unless otherwise provided by agreement indorsed thereon or added thereto, the same should be and become void if the property insured is, or shall after the execution of said policy become encumbered, without the consent of the defendant, or if any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise; that there was a valid and subsisting judgment rendered by the Daviess Circuit Court, in the State of Indiana, in favor of Arnold J. Padgett and J. Alvin Padgett; that the same was and still is a lien upon the premises and build-

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ing damaged by fire, as plaintiff well knew, and that defendant insurance company had no knowledge of said judgment, and no indorsement concerning the same was made upon the policy sued on. The appellee replied in two paragraphs to each paragraph of the answer, the first being a general denial. In the second paragraph to the first and second paragraphs of answer appellee alleged that prior to the contract of insurance sued on she and her husband united in signing a deed for the property described in the policy to one Antonia Feist; that said deed was without any consideration whatever, and purely voluntary; that it was prepared and signed without the knowledge or consent of said Antonia Feist; that it was never delivered; that appellee always retained possession of the deed, except for a short time it was in possession of the recorder for the purpose of being recorded; that appellee always kept possession of the property described in the deed, paid the taxes on it, improved it, and exercised absolute dominion over it; that said Antonia Feist had no knowledge that said deed had been made, signed, or recorded, until long after the fire which destroyed the property, and upon information of these facts, and at the request of the appellee, voluntarily reconveyed said property to appellee; that at the time of the execution of said deed she meant and intended to hold and retain the same for and during the continuance of the married relations between her and her husband, and same was not to be delivered, or to have any force or effect as a conveyance, except in the event she should die prior to her said husband; that same should not be considered as delivered except in that event. It is further averred that she and her husband are Germans, and are unable to read the English language; that she had confidence in and relied upon the advice of one Samuel Mattingly, a notary public, and who was agent for the defendant building and loan association, who advised her that such a deed as she signed would in no way affect her

right and interest in the property in the event she survived her husband, and that she acted upon his advice and procured him to make the deed; that she did not read and could not read any of the provisions of said policy, and that none of said provisions in said policy were read to her, and she had no knowledge or information about any of the provisions of said policy, and that she never had possession of said policy, but same was always in possession of the loan association, which had the mortgage on said property.

Appellees' second paragraph of reply to appellant's fourth paragraph of answer, setting up judgment lien, alleges that plaintiff and one Joseph Feist are wife and husband; that they live together as one family in the State of Indiana, and have so lived for forty years; that plaintiff has been a resident and householder of Indiana for forty years; that her husband is an invalid, and has no estate; that at the time of the rendition of the judgment set out in defendant's answer, and ever since, all the property of which plaintiff was owner was worth less than \$600, and that she claims all of said property free from judgment lien set out in said fourth paragraph of answer.

A trial resulted in a verdict in favor of appellee for \$634.20, \$122 of which appellee, with the leave of the court, remitted, and judgment was rendered in her favor for \$512.20. The building and loan association filed its cross-complaint, which was, with the consent of the court, withdrawn, and which need not be further mentioned.

Appellant assigns as errors the action of the court in overruling appellant's demurrer to appellees' complaint; in overruling appellant's demurrer to the second paragraph of appellees' reply; in overruling appellant's demurrer to the fourth paragraph of appellees' reply; and in overruling the appellant's motion for a new trial.

It is insisted that the complaint is insufficient because it declares ownership of the plaintiff in lot number twenty-

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five in McTeagart's addition to the city of Washington, Daviess county, Indiana, while the policy shows that the defendant insurance company agreed to insure plaintiff against loss by fire of a dwelling situated on lot twenty-five in McTeagart's fifth addition to the city of Washington, Indiana. The variance between the description in the complaint and in the policy is manifestly clerical. The complaint alleges that appellant owned the dwelling-house, and personal property therein, on a certain lot. Whether the error was in the complaint or in the policy it was evident the court would have given leave to correct. The variance might have been good ground of objection to the introduction of the policy in evidence, but did not make the complaint bad.

It is contended the second paragraph of reply to the first and second paragraphs of answer is bad: (1) Because on its face it declares the property to have been conveyed in trust for the use of Joseph Feist, and that that was the purpose of the grantor; (2) because it purports to answer both the first and second paragraphs of the answer, which it does not do; (3) because said grantor expressly admits by her pleading that under certain conditions said deed was to pass title from her to her grantee, and no words of limitation having been inserted in said deed it must be taken and considered as a deed absolutely in fee simple as against the grantor in this case; (4) because it is a departure from the facts pleaded in the complaint. The paragraph in question declares that at the time of making the deed it was the intention of the grantor to retain it in her possession during the existence of the marriage relation between appellee and her husband, Joseph Feist, and that it was not to be delivered and to have effect except in the event appellee should die before her husband.

A delivery of a deed is an essential part of its execution; without delivery there is no execution. A delivery is not

effective without an intent on the part of the grantor that it is to be delivered, accompanied by an act to carry out such intent. *German Ins. Co. v. Gibe*, 162 Ill. 251, 44 N. E. 490; *Osborne v. Eslinger*, 155 Ind. 351; *Fifer v. Rachels*, 27 Ind. App. 654.

There are numerous decisions to the effect that the acceptance of a party to whom a conveyance is made for his benefit will be presumed until the contrary appears, and the instrument takes effect without waiting for a delivery to the grantee named. The authorities in this State go no farther than to hold that, if a deed is recorded by the grantor, the delivery will be presumed, but this presumption may be overthrown. The question of delivery is to be determined by the court or jury. *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind. App. 332, and cases cited.

It appears that appellee, after the deed was placed on record, took possession of the same, and exercised dominion over it, and that the grantee had no knowledge of its existence, and it was the purpose that it should not be delivered except upon conditions set out. There was no delivery. *Weber v. Christen*, 121 Ill. 91, 11 N. E. 893, 2 Am. St. 68; *Gifford v. Corrigan*, 105 N. Y. 223, 11 N. E. 498; *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; *Knop v. National Fire Ins. Co.*, 101 Mich. 359, 59 N. W. 653; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 12 Atl. 668, 2 Am. St. 686; *Elliott v. Ashland, etc., Ins. Co.*, 117 Pa. St. 548, 12 Atl. 676, 2 Am. St. 703; *Osborne v. Eslinger*, *supra*; *Fireman's Fund Ins. Co. v. Dunn*, *supra*.

The first and second paragraphs of answer plead substantially the same defects, viz., no title, no insurable interest, because of the deed to Antonia Feist. It is good as to both. The fact that there was no delivery, and therefore no conveyance, meets these objections.

We can not agree with counsel for appellant that the reply is a departure from the complaint. The complaint

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avers title in appellees. Appellant averred facts to show there was no title; that the title had been conveyed. The reply pleaded facts to avoid the facts set up in the answer. These facts support the complaint.

It is urged that the second paragraph of reply to the fourth paragraph of answer is bad, for the reason that the husband and wife can not each claim an exemption to the amount of \$600 when living together. As it does not appear that the husband was claiming an exemption as a householder, the question is not presented.

It is, however, argued against this paragraph that it does not show that the judgment which it is alleged in the answer was a lien upon the property insured was a judgment upon a contract of the appellee. The right of exemption is given only upon contracts express or implied, and when such right is pleaded it must appear that the judgment was of the character entitling the claimant to the exemption. The reply contains no facts upon which to predicate the claim. *Goldthait v. Walker*, 134 Ind 527, and cases cited.

Judgment reversed, with instruction to sustain demurrer to second paragraph of reply to the fourth paragraph of answer. Questions presented by motion for a new trial may not be raised again, and are therefore not considered.

ALERDING ET AL., EXECUTORS, v. ALLISON.

[No. 4,434. Filed October 8, 1903.]

ACCORD AND SATISFACTION.—*Payment by Will.*—Plaintiff filed a claim against decedent's estate for \$15,620 for services rendered during the life of decedent covering a period of eighteen years. There was evidence of an agreement to the effect that if claimant should remain in such employment until such time as she should marry, and faithfully perform her duties, she should receive by will or otherwise one-half of the estate, and if she should remain until the death of decedent, she should receive all of the decedent's estate. Decedent made a will giving her entire estate to others,

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except her household goods and \$500, which she gave to claimant, without reference to the agreement. *Held*, that the legacy was intended as a satisfaction of the debt, and the acceptance thereof by claimant amounted to a satisfaction of the debt. . pp. 398-404.

EXECUTORS AND ADMINISTRATORS.—*Claims.—Payment by Will.—Estoppel.*—In the trial of a claim against a decedent's estate for services under an alleged contract to compensate claimant by will, no plea of estoppel was necessary in order to enable defendant to take advantage of the acceptance by the claimant of a legacy given her by decedent. p. 404.

From Marion Circuit Court (7,468); *Vinson Carter*, Special Judge.

Irene Allison filed a claim against the estate of Helen J. Tate, deceased, for services. From a judgment for plaintiff, defendant appeals. *Reversed*.

D. J. Hefron, Charles Harrington, D. W. Howe and R. T. Byers, for appellant.

C. W. Smith, J. S. Duncan, H. H. Hornbrook, Albert Smith and Lafayette Perkins, for appellee.

ROBY, J.—Appellee's claim was in two paragraphs. The first contained a bill of particulars as follows: The estate of Helen J. Tate to Irene Allison, Dr. To services from February 25, 1882, to December 18, 1889, as companion, housekeeper, cook, and nurse, 406 weeks, at \$25 per week, \$10,150. To services from December 18, 1889, to June 26, 1900, as companion, cook, adviser, housekeeper, and nurse, 547 weeks, at \$10 per week, \$5,470. Total \$15,620. In the second, it was substantially averred that the appellee on February 25, 1882, entered the employment of Helen J. Tate under an agreement that if she continued in such employment until such time as she should marry, and faithfully perform her duties thereunder, she should receive by will or otherwise one-half the estate of which Mrs. Tate should die possessed; that if she remained in said employment until Mrs. Tate's death, she should receive by will or otherwise the entire estate; that on December 18, 1889, appellee intending soon to be married

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and to quit said employment, Mrs. Tate promised that if she would not quit such employment, but continue thereunder until her death, holding herself in readiness from that time on, although married, to do and perform faithfully such services as she was able, which she might be called upon by Mrs. Tate to do, appellee should receive by will or otherwise the entire estate of which Mrs. Tate should die possessed; that appellee should not be required to live with Mrs. Tate, but could dwell elsewhere, and come back and forth to her residence as often as she might be needed or called upon; that, relying on said promises, appellee diligently, in compliance with said agreement, remained continuously in said employment until the 26th day of June, 1900, when Mrs. Tate died. Full performance of said agreement on her part is averred, and that said Helen J. Tate failed to carry out by will or otherwise said agreement on her part, but, on the contrary, devised and bequeathed most of her property, both real and personal, to other parties, except \$500 and part of the household goods. "Claimant further says that the aforesaid services rendered by her to said Helen J. Tate under said employment are reasonably worth the sum of \$25 per week for the 406 weeks from the 25th day of February, 1882, to the 18th day of December, 1889, and \$10 per week for the 547 weeks from said 18th day of December, 1889, to said 26th day of June, 1900, or \$15,620 in all, which sum claimant avers is justly due her from said estate and wholly unpaid. Wherefore," etc. Answers to each paragraph of general denial, payment, and statute of limitations. Trial by jury, verdict for appellee assessing her recovery at \$6,000, with answers to interrogatories. Judgment on verdict. Error assigned is in overruling motion for new trial.

The evidence shows that in November, 1881, appellee, then fifteen years old, went to work in the Tate family as a domestic at \$3 per week. The Tates then lived on

a farm of several hundred acres near Indianapolis, and had in their employment a number of persons, both male and female. In February, 1882, Mrs. Tate asked appellee's mother to let her adopt the girl. The request was refused. The conversation following is relied upon to establish the contract set up. It was testified to by the mother and another daughter. The mother's version was as follows: "What did Mrs. Tate say? A. She said: 'Then I have another question to ask you. Would you be willing to let her remain here as one of the family, and I do for her like I would for my own child, and care for her, and clothe her, and give her spending money?' And I says: 'Well, if you take good care of her.' And she said: 'I will. I will take good care of her.' I said: 'She is young, and I have never put anything hard on her, and I do not want you to put anything hard on her.' Q. What else? A. She said another thing—that, 'If she lives with me until she is married I will give her half I have got, and, until my death, I will make her my heir.' Q. If she lived there until she was married she was to give her half of what she had? A. Yes, sir. Q. But if she remained until Mrs. Tate's death then she was to make her her heir? A. Yes, sir. Q. Is that right? A. Yes, sir. And if she died in the meantime she would put her in a nice spot in Crown Hill, and cover her with flowers." Appellee thereafter continued in the family, being treated as a member of it, but doing a great deal of work. On December 18, 1889, appellee left, and took lodging with Mrs. Grube in Indianapolis where she remained until the last of the following November, being married on March 27, 1890. She and her husband have since lived in the city, and have two children. In the fall of 1892 the Tates also moved into the city, locating about two miles from appellee. After this appellee visited them frequently, and it is fairly inferable from the evidence that she gave them attention such as a daughter might have done, but not to

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have been expected, in view of their various ailments, from one not sustaining such relation. Lizzie Billips, a colored woman who had worked for the Tates some time, testified that she was called into a room at their residence after appellee had left, but before her marriage, and overheard a conversation, which she gives as follows: "A. I heard Mrs. Tate say if Mr. Allison would agree to let her come back—backwards and forwards—as long as she was alive, that she would not give her anything when she got married, but she would give her something at her death. She expected to leave her so that she would not want for anything any more, if he would agree to let her come. Q. Did they agree to it? A. Yes, sir, he did. * * * A. What I told you this morning. Mrs. Tate said that she was willing for Mrs. Allison and Mr. Allison to get married if she would come back and forwards—come to her beck and call; that was Mrs. Tate's words. * * * A. She said she would not give her anything when she was going to get married, but she would give her something at her death." There was evidence of various statements made by Mrs. Tate to the effect that she intended to provide for appellee in her will; that she would leave her well fixed so that she would not have to work any more; that she intended to pay her for what she had done and that it would be all hers anyway. None of the expressions so testified to contained any direct allusion to any contract or agreement upon her part to make such a disposition.

Mrs. Tate left at her death a will, containing thirty-three specific items, the thirty-fourth one naming her executors. By this will she disposed of all her property, inventoried at \$54,041. The fifteenth item thereof was as follows: I give and bequeath to Irene Allison, wife of James Allison, all the furniture, carpets, pictures, ornaments, utensils, and other household articles of every description in my residence and not otherwise in this will specifically

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bequeathed to other legatees." The twenty-sixth item was as follows: "I give and bequeath to Mrs. Irene Allison, the same mentioned in item number fifteen of this will, the sum of \$500." Before the claim in suit was filed appellee received and receipted for the articles described in item fifteen, appraised at \$310. It thus appears that Mrs. Tate did make a testamentary provision for appellee. Appellee claims that the contract required a larger one. Had the provisions made been in accord with the alleged agreement there would, of course, be no room for recovery of the reasonable value of services rendered thereunder. *Eaton v. Benton*, 2 Hill 576, 578.

The general doctrine of satisfaction by legacy is that when one, being indebted to another, gives him by will a sum of money as great or greater than the debt, without saying anything about it, this shall nevertheless be a satisfaction of the debt. Pomeroy, Eq. Jurisp. (2d ed.), §527. The exceptions to this rule are stated by appellee's learned counsel, and are so numerous as practically to make the rule an exception to the exceptions. In the case at bar the general doctrine is not applicable. The distinction and the rule that is applicable are stated by Mr. Pomeroy as follows: "The general doctrine as to a presumption of satisfaction, and the limitations upon it, described in the foregoing paragraphs, are based upon the bare facts of a debt and a legacy, upon their respective natures, and upon the relative situation of the testator and the creditor-legatee; and they assume that there is no express language in the will, accompanying the legacy, and declaring its object and effect, or no previous arrangement between the parties stamping a special character upon the testamentary gift. It is therefore well settled that if one person renders any services to another upon an understanding or arrangement that he is to be remunerated therefor by a testamentary benefit, and the party receiving the services afterwards makes a bequest or devise in his will in favor of

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the other, which is in its amount and value a reasonably sufficient compensation, such testamentary provision is a satisfaction, and the creditor party can not enforce his demand as a debt by an action against the estate. It would seem that, under these circumstances, the creditor party would not even have an election, since he had agreed to look to the testamentary benefit alone for compensation. This result, however, must evidently depend upon the terms of the original agreement, in pursuance of which the services were rendered. Wherever, also, there being an existing indebtedness, it is agreed between the parties, either expressly or impliedly, that it shall be paid by some benefit bestowed in the debtor's will, and a testamentary provision is subsequently made in favor of the creditor, which he accepts, his demand will thereby be satisfied; he can not both take the bequest and enforce his debt as a subsisting claim against the estate. In this, however, the creditor has an election either to accept the bequest in satisfaction of his preëxisting demand, or to renounce the gift and enforce the demand." Pomeroy, Eq. Jurisp. (2d ed.), §538.

That the agreement was to pay appellee by a testamentary provision is asserted by her. A testamentary provision for her has been made. She has availed herself of it. Had the will contained a recital that the bequest made was intended to be in full for all claims or debts, accepting the legacy would amount to a satisfaction of the claim. *Rose v. Rose*, 7 Barb. 174. The intention that it shall be so taken appears in this case both upon the face of the will and from the facts exhibited in connection therewith. If the legacies were not thus intended, the testator is placed in the position of attempting the impossible—of making bequests to various persons, knowing that appellee held an unsatisfied contract entitling her to the entire estate. Deficiency of assets requires that a legacy be construed as a satisfaction. Toller, Executors, 338; 2 Williams, Ex-

ecutors (7th Am. ed.), 615; *Cuthbert v. Peacock*, 1 Salk. 155.

The conversation testified to by Mrs. Billips, and also relied upon as establishing appellee's contract, does not tend to show that either party to it understood that upon her marriage appellee became entitled to one-half of the estate of Mrs. Tate at her death. In view of the verdict, it must be at this stage of the case taken as established that such contract did then exist, and that at the death of Mrs. Tate, appellee was entitled to the entire estate. The evidence nevertheless tends to show that such liability was denied by Mrs. Tate, or perhaps it is better to say that it was not in anywise admitted. That the legacy could be in addition to what appellee was by contract entitled to recover is impossible. The situation occupied by Mrs. Tate when the will was made, and her attitude toward the contract, and the terms of the contract, negative the idea that the legacy given was intended to be in addition to the contract obligation; and the appellee, having elected to take such legacy, can not be permitted thereafter to claim additional compensation. The contract being within the statute of frauds was not enforceable. *Wallace v. Long*, 105 Ind. 522, 531, 55 Am. Rep. 222.

The action is brought to recover the value of what it is alleged was done by one party to it in reliance upon the contract, the other party having refused to perform. *Wallace v. Long, supra*, 526. The making of such contract and its violation by Mrs. Tate are averred in the complaint. The allegation as to its violation was not well made, but assuming it to be sufficient, it follows that proof of such facts by the appellee in the first instance were essential. No plea of estoppel was therefore necessary to enable the appellants to take advantage of the satisfaction of said contract, they thereby negating that which ~~upon~~ the appellee to prove. §380 Burns 1901.

MAY TERM 1901

Lincoln School vs. American School Trustees

It follows that the following order is so ordered. Cause remanded with motion for new trial and for costs.

LINCOLN SCHOOL TRUSTEES vs. AMERICAN SCHOOL TRUSTEES

[No. 45. First Term 1901]

TOWNSHIP.—TOWNSHIP TRUSTEES vs. AMERICAN SCHOOL TRUSTEES. The township reform law, Act 1901, § 1, provides that the management of the affairs of the school township shall be vested in the township trustees by the act of March 4, 1901. The act further provides that the township trustees shall have charge of the township affairs, and shall provide for the maintenance, operation, etc., of the township schools, and shall be responsible for the same.

From Hendricks Circuit Court, 1901.
Action by the American School Trustees against Lincoln School Trustees for plaintiff, defendant appeals. Error for plaintiff, defendant appeals. Error.
R. W. McBride, C. S. Leach, J. L. Wiley, for appellant.
Harvey, for appellee.
E. G. Hogate and J. L. Wiley, for appellee.

WILEY, J.—This was an action by the appellant to recover for certain damages sustained by the appellee. The complaint contained two paragraphs. The first paragraph was sustained. The second paragraph was sustained. The third paragraph was sustained. The fourth paragraph was sustained. The fifth paragraph was sustained. The sixth paragraph was sustained. The seventh paragraph was sustained. The eighth paragraph was sustained. The ninth paragraph was sustained. The tenth paragraph was sustained. The eleventh paragraph was sustained. The twelfth paragraph was sustained. The thirteenth paragraph was sustained. The fourteenth paragraph was sustained. The fifteenth paragraph was sustained. The sixteenth paragraph was sustained. The seventeenth paragraph was sustained. The eighteenth paragraph was sustained. The nineteenth paragraph was sustained. The twentieth paragraph was sustained. The twenty-first paragraph was sustained. The twenty-second paragraph was sustained. The twenty-third paragraph was sustained. The twenty-fourth paragraph was sustained. The twenty-fifth paragraph was sustained. The twenty-sixth paragraph was sustained. The twenty-seventh paragraph was sustained. The twenty-eighth paragraph was sustained. The twenty-ninth paragraph was sustained. The thirtieth paragraph was sustained. The thirty-first paragraph was sustained. The thirty-second paragraph was sustained. The thirty-third paragraph was sustained. The thirty-fourth paragraph was sustained. The thirty-fifth paragraph was sustained. The thirty-sixth paragraph was sustained. The thirty-seventh paragraph was sustained. The thirty-eighth paragraph was sustained. The thirty-ninth paragraph was sustained. The fortieth paragraph was sustained. The forty-first paragraph was sustained. The forty-second paragraph was sustained. The forty-third paragraph was sustained. The forty-fourth paragraph was sustained. The forty-fifth paragraph was sustained. The forty-sixth paragraph was sustained. The forty-seventh paragraph was sustained. The forty-eighth paragraph was sustained. The forty-ninth paragraph was sustained. The fiftieth paragraph was sustained. The fifty-first paragraph was sustained. The fifty-second paragraph was sustained. The fifty-third paragraph was sustained. The fifty-fourth paragraph was sustained. The fifty-fifth paragraph was sustained. The fifty-sixth paragraph was sustained. The fifty-seventh paragraph was sustained. The fifty-eighth paragraph was sustained. The fifty-ninth paragraph was sustained. The sixtieth paragraph was sustained. The sixty-first paragraph was sustained. The sixty-second paragraph was sustained. The sixty-third paragraph was sustained. The sixty-fourth paragraph was sustained. The sixty-fifth paragraph was sustained. The sixty-sixth paragraph was sustained. The sixty-seventh paragraph was sustained. The sixty-eighth paragraph was sustained. The sixty-ninth paragraph was sustained. The seventieth paragraph was sustained. The seventy-first paragraph was sustained. The seventy-second paragraph was sustained. The seventy-third paragraph was sustained. The seventy-fourth paragraph was sustained. The seventy-fifth paragraph was sustained. The seventy-sixth paragraph was sustained. The seventy-seventh paragraph was sustained. The seventy-eighth paragraph was sustained. The seventy-ninth paragraph was sustained. The eightieth paragraph was sustained. The eighty-first paragraph was sustained. The eighty-second paragraph was sustained. The eighty-third paragraph was sustained. The eighty-fourth paragraph was sustained. The eighty-fifth paragraph was sustained. The eighty-sixth paragraph was sustained. The eighty-seventh paragraph was sustained. The eighty-eighth paragraph was sustained. The eighty-ninth paragraph was sustained. The ninetieth paragraph was sustained. The ninety-first paragraph was sustained. The ninety-second paragraph was sustained. The ninety-third paragraph was sustained. The ninety-fourth paragraph was sustained. The ninety-fifth paragraph was sustained. The ninety-sixth paragraph was sustained. The ninety-seventh paragraph was sustained. The ninety-eighth paragraph was sustained. The ninety-ninth paragraph was sustained. The hundredth paragraph was sustained.

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bequeathed to other legatees." The twenty-sixth item was as follows: "I give and bequeath to Mrs. Irene Allison, the same mentioned in item number fifteen of this will, the sum of \$500." Before the claim in suit was filed appellee received and receipted for the articles described in item fifteen, appraised at \$310. It thus appears that Mrs. Tate did make a testamentary provision for appellee. Appellee claims that the contract required a larger one. Had the provisions made been in accord with the alleged agreement there would, of course, be no room for recovery of the reasonable value of services rendered thereunder. *Eaton v. Benton*, 2 Hill 576, 578.

The general doctrine of satisfaction by legacy is that when one, being indebted to another, gives him by will a sum of money as great or greater than the debt, without saying anything about it, this shall nevertheless be a satisfaction of the debt. Pomeroy, Eq. Jurisp. (2d ed.), §527. The exceptions to this rule are stated by appellee's learned counsel, and are so numerous as practically to make the rule an exception to the exceptions. In the case at bar the general doctrine is not applicable. The distinction and the rule that is applicable are stated by Mr. Pomeroy as follows: "The general doctrine as to a presumption of satisfaction, and the limitations upon it, described in the foregoing paragraphs, are based upon the bare facts of a debt and a legacy, upon their respective natures, and upon the relative situation of the testator and the creditor-legatee; and they assume that there is no express language in the will, accompanying the legacy, and declaring its object and effect, or no previous arrangement between the parties stamping a special character upon the testamentary gift. It is therefore well settled that if one person renders any services to another upon an understanding or arrangement that he is to be remunerated therefor by a testamentary benefit, and the party receiving the services afterwards makes a bequest or devise in his will in favor of

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the other, which is in its amount and value a reasonably sufficient compensation, such testamentary provision is a satisfaction, and the creditor party can not enforce his demand as a debt by an action against the estate. It would seem that, under these circumstances, the creditor party would not even have an election, since he had agreed to look to the testamentary benefit alone for compensation. This result, however, must evidently depend upon the terms of the original agreement, in pursuance of which the services were rendered. Wherever, also, there being an existing indebtedness, it is agreed between the parties, either expressly or impliedly, that it shall be paid by some benefit bestowed in the debtor's will, and a testamentary provision is subsequently made in favor of the creditor, which he accepts, his demand will thereby be satisfied; he can not both take the bequest and enforce his debt as a subsisting claim against the estate. In this, however, the creditor has an election either to accept the bequest in satisfaction of his preëxisting demand, or to renounce the gift and enforce the demand." Pomeroy, Eq. Jurisp. (2d ed.), §538.

That the agreement was to pay appellee by a testamentary provision is asserted by her. A testamentary provision for her has been made. She has availed herself of it. Had the will contained a recital that the bequest made was intended to be in full for all claims or debts, accepting the legacy would amount to a satisfaction of the claim. *Rose v. Rose*, 7 Barb. 174. The intention that it shall be so taken appears in this case both upon the face of the will and from the facts exhibited in connection therewith. If the legacies were not thus intended, the testator is placed in the position of attempting the impossible—of making bequests to various persons, knowing that appellee held an unsatisfied contract entitling her to the entire estate. Deficiency of assets requires that a legacy be construed as a satisfaction. Toller, Executors, 338; 2 Williams, Ex-

election of a township advisory board, and prescribes their duties. The board is to act in an advisory capacity with the township trustee in fixing the rate of taxation, in determining township expenditures upon estimates furnished by the trustee, and clothes the board with certain authority in specific matters. At the annual meeting of the advisory board, among other things, section four requires that the trustee shall present to the board a detailed and itemized statement in writing "of all the property and supplies on hand whether in use or in store, for road, school and other purposes; * * * the items of school supplies necessary for each school." Section six of the act provides: "In no event shall a debt of the township, not embraced in the annual estimates fixed and allowed, be created, without such special authority, and any payment of such unauthorized debt from the public funds shall be recoverable upon the bond of the trustee," etc. The term "special authority" as above used refers to authority given by the board at a special meeting of the board, upon call of the trustee, to determine whether an emergency exists for the expenditure of any sums not included in the existing estimates and levy as fixed at the annual meeting. Section nine of the act provides: "If he [the trustee] desires to purchase any school furniture, fixtures, maps, charts or other school supplies, excepting fuel * * * in such amounts as may be authorized by the advisory board, in any year, he shall make an estimate of the kinds and amounts, itemized particularly, to be used by bidders therefor." The same section also provides: "When a bid is accepted, a proper contract shall then be reduced to writing * * * and be signed by the successful bidder and the trustee, who shall require the bidder to give bond with security," etc. Section eleven of the act, provides that, "all contracts made in violation of this act shall be null and void." All the provisions of this act were in force when the contracts in suit were made, unless, as contended by appellee, certain

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of them were repealed by the act of March 4, 1899 (Acts 1899, p. 424). It is urged with much force and vigor that the latter act repealed the act of February 27 (Acts 1899, p. 150), in so far as the former law related to and controlled township trustees in the management of the affairs of the school township. The rulings of the trial court upon the demurrers to the various pleadings seem to indicate that it proceeded upon the theory that the latter act repealed the former in so far as it related to the powers and duties of the school township. Counsel for appellant concede, in argument, that if, in relation to the affairs of the school township, the trustee is not governed by the provisions of the "reform law" (Acts 1899, p. 150), then the rulings of the trial court were right, and the judgment should be affirmed.

The act of March 4, 1899, contains three sections, aside from the repealing and emergency clauses. Section one provides that township trustees shall take charge of the educational affairs of their respective townships. It empowers them to employ teachers, to locate conveniently a sufficient number of schools, to build or provide houses, furniture, apparatus, etc.; also provides that a trustee may establish and maintain in his township at least one graded high school; that the school trustees of two or more school corporations may establish and maintain joint graded high schools; that a trustee, instead of establishing a graded high school, may pay the tuition of his pupils competent to enter such school to another school corporation, such payment to be made out of the special school revenue; and that no such graded high school shall be built unless there are at least fifteen common-school graduates of school age residing in the county. Section two fixes the duration of the term of school in each township, and empowers the trustee to "authorize a local tuition levy sufficient to conduct a six months term of school each year based on estimates and receipts from all sources for the previous year: * * *

Provided, such levy shall not exceed the limit now provided by law." Section three provides that the "school trustees shall have the care and management of all property, real and personal, belonging to their respective corporations for common-school purposes, except the congressional township school lands, which lands shall be under the care and management of the trustee of the civil township," etc.

Opposing counsel agree that the latter act is substantially a reënactment of other statutes then in force, and as section four repeals "all laws and parts of laws inconsistent with this act," the present important question is to determine whether there are any provisions of the act of February 27, 1899, inconsistent with the act of March 4, 1899.

There are some general rules applicable to the repeal of statutes that may be briefly noted: (1) Repeals by implication are not favored. (2) Repeals by implication are recognized only when the earlier and later acts are repugnant to or are irreconcilable with each other. In such case, if the two acts, by a fair and reasonable interpretation, can be made to operate in harmony, both will be upheld, and the later one will not be regarded as repealing the former by construction or intendment. (3) Where two statutes relating to the same subject-matter are enacted at different dates, but during the same session of the legislature, the presumption is that the lawmaking body intended that both should be operative and should be construed together. (4) The subsequent action of the legislature with reference to the subject-matter may be looked to and considered in determining the legislative intent as to a particular act. By the act of March 4, *supra*, it is evident there was no direct or express repeal of that part of the township reform law pertaining to the duties of school trustees. An express or direct repeal is where the repealed act is specifically designated in the repealing act.

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It follows that if the former act was repealed, it was by implication, unless the two acts are repugnant to or irreconcilable with each other. It has been declared that where a new statute covers the whole subject-matter of an old one, adds new provisions, and makes changes, and where such new law, whether it be in the form of an amendment or otherwise, is evidently intended to be a revision, and to take the place of the old, it repeals the old law by implication. *Nichols v. State*, 27 Ind. App. 444; *Thomas v. Town of Butler*, 139 Ind. 245; *Warford v. Sullivan*, 147 Ind. 14. The act of March 4, *supra*, does not pretend to cover the whole subject-matter of the act of February 27, *supra*; it does not make any changes, and it is evident that it was not intended to be a revision, or to take its place. Giving to it the most liberal construction, we do not see where it is repugnant to or irreconcilable with it.

The two acts under consideration were passed by the same legislature, and only five days elapsed between their passage. It is too well understood to admit of debate or conjecture why the reform law was passed. It is sufficient to say that it was to correct evils which had grown up under previous laws, and to prevent unwarranted raids upon township treasuries. It is common history of the State, and hence courts take notice of it, that many of the evils with which the people and the legislature were confronted grew out of the unlimited authority which township trustees assumed, under the old law, pertaining to their duties in the management and control of the common schools. It was to curtail and limit that authority in large measure that caused the legislature to pass the township reform law. If the act of March 4, *supra*, repealed that law, as contended by appellee, we would have to conclude that the legislature, after having enacted a law looking to the better protection of the interest of the people in the management and control of township business, deliberately attempted to undo its good work by passing the act of

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The general doctrine of satisfaction by legacy is that when one, being indebted to another, gives him by will a sum of money as great or greater than the debt, without saying anything about it, this shall nevertheless be a satisfaction of the debt. Pomeroy, Eq. Jurisp. (2d ed.), §527. The exceptions to this rule are stated by appellee's learned counsel, and are so numerous as practically to make the rule an exception to the exceptions. In the case at bar the general doctrine is not applicable. The distinction and the rule that is applicable are stated by Mr. Pomeroy as follows: "The general doctrine as to a presumption of satisfaction, and the limitations upon it, described in the foregoing paragraphs, are based upon the bare facts of a debt and a legacy, upon their respective natures, and upon the relative situation of the testator and the creditor-legatee; and they assume that there is no express language in the will, accompanying the legacy, and declaring its object and effect, or no previous arrangement between the parties stamping a special character upon the testamentary gift. It is therefore well settled that if one person renders any services to another upon an understanding or arrangement that he is to be remunerated therefor by a testamentary benefit, and the party receiving the services afterwards makes a bequest or devise in his will in favor of

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him before. The prosecution was then dismissed, and this action thereafter brought against White and Lawrence, it being averred in the second paragraph of the complaint upon which the jury found for appellee that said defendants were the owners and proprietors of a certain boarding-house, and that defendants unlawfully procured plaintiff to be arrested.

It was evidently the theory of the pleader that such alleged joint ownership or partnership rendered the defendant Lawrence responsible for the alleged wrong by his co-defendant White. Such relation in itself is not, however, sufficient to render the non-acting partner liable. In the absence of knowledge he would not be responsible for the act of his codefendant, unless it was made to appear that he had in some way authorized White to take the steps complained of. *Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169; *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412; *Marks & Co. v. Hastings*, 101 Ala. 165, 13 South. 297.

The jury, with the general verdict, returned answers to interrogatories, from which it appears, without conflict or contradiction, that appellant Lawrence had nothing personally to do with the prosecution complained of; that he did not know that an affidavit would be made or filed until after the prosecution had terminated; that he did not advise or suggest the making of such affidavit, nor authorize or direct appellant White to make the same; and that White was neither owner nor part owner of the hotel. These facts are sufficient to exonerate said appellant from liability, no matter what construction be given the complaint. His motion for judgment upon the interrogatories and their answers, notwithstanding the general verdict, should have been sustained.

It was the duty of the court, the facts not being controverted, to instruct the jury as to whether probable cause for the prosecution complained of did or did not exist.

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When the facts are disputed the court instructs hypothetically or otherwise, leaving the jury to find the fact. Probable cause is defined as "that apparent state of facts found to exist upon reasonable inquiry; that is, such inquiry as a given cause renders convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged." *Hutchinson v. Wenzel*, 155 Ind. 49; *Lacy v. Mitchell*, 23 Ind. 67.

The affidavit made by White was based upon the second section of the act, and proceeded upon the theory that appellee had removed baggage from the hotel, which at the time was subject to the landlord's lien. *State v. Engle*, 156 Ind. 339. There may be evidence tending to show that DeLury did remove part of his baggage, but the fact is decidedly obscure. He surely left a considerable amount. There does not appear to have been any occasion for haste in the institution of a criminal action. The offense charged was not of such an aggravated nature as to arouse apprehension that appellee, known to be a resident of Indianapolis for some years, would become a fugitive from justice on account of it.

The identity of Leathers with DeLury was the important fact. Goods once in the possession of Leathers had been left at the hotel by DeLury. White had the means of identification at hand. He had only to call upon his employe in order to be certain. Instead of taking any steps to learn the truth, he assumed the identity of the person, notwithstanding the difference of name. Appellee was entitled to the presumption of innocence, and such facts as White had learned regarding him did not tend to weaken such presumption. The belief that justifies accusation and arrest must be founded upon facts and circumstances that would induce a reasonable and prudent man, mindful of the right of individual security possessed by every citizen, to act. Had White been arrested himself under exactly

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the same circumstances, he would likely not be satisfied with the inquiry made. It is believed he did not exercise that degree of reasonable inquiry that the circumstances and situation suggested, and the court should have so instructed the jury. The result reached was, upon this part of the case, correct, and the error is not, therefore, a reversible one.

The statement of fact made to the prosecuting attorney was not a correct one. It included the identification of the person by the employe. Such identification was not made, and had not been made. The advice of the attorney, based upon such information, is not a defense. *Flora v. Russell*, 138 Ind. 153; *Paddock v. Watts*, 116 Ind. 146, 9 Am. St. 832.

The general rule is that probable cause is established by facts known to the prosecutor at the time the criminal action was instituted. The letter written by the shoe company, and above set out, was directly relevant to that issue, being, as it was, one of the conditions in the light of which White acted. Appellants took the deposition of W. A. Julian, president of the shoe company, who testified that he sent the letter in question to the manager of the hotel. He also testified in chief that appellee was employed by the shoe company in the spring of 1900, and left its employment in the following November; that he carried its samples; that he did not return the samples, and that he carried an order-book which was not returned; that he saw the samples in question at the Spencer House on October 10, 1901; that he never had any man named DeLury in his service, and knew no man by that name; that he had a call from Sullivan, and immediately thereafter wrote the letter referred to; that Sullivan told him that appellee had left without paying his board bill.

On cross-examination the witness was compelled, over objection, to testify in effect, that the statement of the letter that appellee had "beat us out of a lot of money" was

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not true. He was also compelled to testify that before he wrote the letter he had been informed by appellee that the sample case had been stolen from him. Appellants did not know the falsity of the letter, or the bad faith of the writer. They acted only upon its statements. They were in no wise responsible for the wrong done by the shoe company to the appellee, either in writing the letter or prior thereto. Had they chosen to introduce the letter in evidence without attempting to support its statements by oral testimony, the appellee could not have been permitted to disprove such statements. "Those facts and circumstances which are known to the prosecutor at the time he instituted the prosecution are to be alone considered in determining the question of probable cause." *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Walker v. Pittman*, 108 Ind. 341.

The oral evidence delivered by the witness Julian tended to give weight to that which had been written by him. His opportunity of knowing the truth was exhibited. The tendency of the questions asked and the answers made by him was to give probability to the assertion made in the letter. They directly connected appellee with the sample case and order-book and made the truth of the statement an important element in the trial. *Walker v. Pittman, supra*. The facts stated by him were not communicated to appellants prior to the prosecution. Appellants, by offering evidence supportive of the statements contained in the letter, opened the door to appellee, and there was therefore no error in admitting evidence tending to discredit such statements. Elliott, App. Proc., §628.

The instructions given by the court, taken as a whole, correctly state the law as applicable to the evidence, and do not therefore furnish ground for reversal. *Hutchinson v. Wenzel*, 155 Ind. 49. Those requested and refused were in part covered by those given, and, in so far as they related to the question of probable cause, were correctly refused; its existence not being, as heretofore stated, deducible from the

facts proved. No error appears sufficient to justify a reversal of the judgment as against appellant White. Upon the whole evidence, the result reached seems to have been a correct one, as to him.

The death of appellee since the appeal having been suggested, it is ordered that the judgment against appellant White be affirmed as of the date of submission, and that as to appellant Lawrence the judgment be reversed, and the cause remanded, with directions to sustain his motion for judgment notwithstanding the general verdict.

**SUPREME LODGE OF KNIGHTS OF PYTHIAS v.
ANDREWS ET AL.**

[No. 4,375. Filed June 23, 1903. Rehearing denied October 9, 1903.]

BENEFICIAL ASSOCIATIONS.—Members.—Resort to Court.—A member of a mutual benefit society is not required to exhaust his remedies within the order before resorting to the courts, unless the by-laws of the society make it obligatory upon him to do so. *pp. 428, 429.*

SAME.—Rejection of Members.—Evidence.—Plaintiffs brought suit on a policy of insurance in a beneficial association, alleging that after the issuance of the policy the association created a new class to which members could pass by paying certain increased assessments and passing a medical examination; that some years before his death the deceased made application to be transferred to such class and at such time was "in perfect physical and mental health and condition" and was arbitrarily refused admission thereto. Physicians and others testified that at the time he made application for transfer his physical and mental conditions were good. The evidence further showed that his examination disclosed a pulse rate, claimed by the examiner in chief to be excessive for a man at age of applicant and for such reason he was rejected by the medical examiner in chief, and no attempt was made to prove that the pulse rate was not excessive. *Held*, that the complaint was not sustained by the evidence. *pp. 423-431.*

EVIDENCE.—Action on Insurance Policy.—Heirs as Witnesses.—Heirs of insured were not incompetent witnesses, under §507 Burns 1901, as to the health of insured when he made his application, in an action on an insurance policy payable to the "legal heirs" of insured. *pp. 431, 432.*

From Clay Circuit Court; *P. O. Colliver*, Judge.

Supreme Lodge K. of P. v. Andrews.

Action by Peter Andrews and others against the Supreme Lodge of Knights of Pythias. From a judgment for plaintiffs, defendant appeals. *Reversed.*

C. S. Hardy, S. M. Ralston and G. A. Knight, for appellant.

S. D. Coffey, S. M. McGregor and A. W. Knight, for appellees.

COMSTOCK, P. J.—The appellees, plaintiffs below, are the heirs at law of John Andrews, deceased, and base their two paragraphs of amended complaint upon the membership of said John Andrews in appellant society. The appellant is a secret fraternal beneficiary society, incorporated for charitable and benevolent purposes, under the act of congress, approved June 29, 1894. There are various subordinate branches or lodges of the appellant located in the several states of the United States; one of such lodges having been established in Brazil, Clay county, Indiana, since 1877. The particular subordinate branches of appellant referred to are known as "sections of the Endowment Rank," the Endowment Rank being the insurance branch of the appellant, and an unincorporated but integral part of the appellant. This Endowment Rank is under the direct control and management of a board of control appointed by the appellant. All of the laws governing the Endowment Rank are made by the appellant in its representative conventions. John Andrews, the ancestor of the appellees, became a member of section twenty-five of the Endowment Rank, located at Brazil, in February, 1878. Upon becoming such member, the appellant issued to said John Andrews a certificate of membership in its second class, which provided that "in consideration of the representations and declarations made in his application, bearing date of January 21, 1878, which application is made a part of this contract and the payment of the prescribed admission fee; and in consideration of the payment here-

after to said Endowment Rank of all assessments as required, and the full compliance with all the laws governing this rank now in force or that may hereafter be enacted and shall be in good standing under said laws, the sum of \$2,000 will be paid by the Supreme Lodge Knights of Pythias of the World, to such person or persons as the said brother may direct in his application or as shall be made by him subsequently by will, or otherwise, and entered upon the records of the supreme master of exchequer, upon due notice and proof of death and good standing in the rank at the time of death, and the surrender of this certificate." In 1884 there were 15,000 members in the second class, so that, upon a death occurring in that class, the member's beneficiaries would receive the \$2,000 as the maximum amount to be paid according to the terms of the agreement. In April and May, 1884, the appellant amended various of its laws, and created a new (fourth) class of said Endowment Rank. Prior to the creation of the fourth class, there were but three classes: The first, wherein the maximum amount to be paid upon the death of a member was \$1,000; the second class, of which John Andrews was a member, and the third class, wherein the maximum amount to be paid upon the death of a member was \$3,000. The amount of the payments or assessments required of the members of these three classes depended upon the number of deaths occurring. The plan adopted, and upon which the fourth class was established, was an entirely different one. In that class a member carried \$1,000, \$2,000, or \$3,000 of insurance, as he might desire, and his payments were fixed and were regular amounts payable monthly. The amount of insurance carried and the age of the member determined the amount of the monthly payment required of the members of the fourth class. By the terms of the appellant's laws of 1884 creating the fourth class, all members of the first, second, and third classes were permitted to transfer their membership to the fourth class without any

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cost or expense to them, and were given one year to make such transfers. This time within which transfers could be made was extended to October, 1885; and it was again provided that the members could transfer "without the payment of any fee, and without the passing of a new medical examination." In June, 1888, appellant's supreme lodge amended its laws with respect to the transfer of the old class members to the fourth class, permitting such transfer of all members of the old classes, but thereafter requiring applicants for transfer to make application on a prescribed blank, "be recommended by some competent practicing physician appointed by the board of control of the endowment rank and be examined in accordance with the published rules for medical examiners on the form provided by said board of control, which must be approved by the medical examiner in chief." It was also provided that the age of an applicant for transfer to the fourth class should not be considered. The officers of appellant presented to the members of the old classes the advantages of transferring to the fourth class. In October, 1885, there were less than 2,000 members remaining in the second class; and on the 26th day of January, 1900, the date of the death of John Andrews, there were only twelve members in said second class. When the opportunity to transfer to the fourth class was first given to the members of the old classes, John Andrews failed to transfer. But in March, 1889, he made application to transfer. In his said application for transfer to the fourth class, Andrews agreed, among other things, "and that I will be governed and this contract shall be controlled by all the laws, rules, and regulations of the order governing this rank, now in force, or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the World, or submit to the penalties therein contained."

Andrews' certificate of membership, issued in 1878, was based upon an agreement expressed therein, as follows: "In consideration of the payment hereafter to said Endow-

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ment Rank of all assessments as required, and the compliance of all the laws governing this rank now in force or that may hereafter be enacted." One of the laws of appellant, then in force, was the requirement that the applicant for transfer should be examined and recommended by a practicing physician, and approved by the medical examiner in chief. At the time of making the application for transfer, Andrews was sixty-two years old. Another one of the laws of appellant in force at the time was one fixing the amount of and requiring monthly payments of members in the fourth class. Andrews was examined by the appellant's local physician at Brazil, Indiana, and was, on the 16th of March, 1889, recommended for admission to the fourth class by said local examiner; and in his report, among other things, the local medical examiner said that Andrews' pulse rate, while sitting, was seventy-six, and standing, was eighty. The application and medical examination was submitted to the medical examiner in chief at Cincinnati, Ohio, who disapproved same on April 2, 1889. The medical examiner in chief indorsed on the application his grounds of disapproval, as follows: "Excessive pulse rate for age." Two years later, at the meeting of the board of control of the Endowment Rank, held in January, 1891, Andrews asked that his application for transfer be reconsidered, which was done, and the board re-referred it to the medical examiner in chief for his reconsideration. The medical examiner in chief reported back to the board of control that, by reason of the applicant's physical condition, he could not recommend the transfer of the applicant. This action of the physician in chief was approved by the board of control, and Andrews was advised of the final rejection of his application. At the time of Andrews' rejection for transfer he was entitled to an appeal from such rejection to the supreme lodge of appellant, and it was agreed at the trial that Andrews did not take an appeal from the action in rejecting his application for admission

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to the fourth class. After his application was rejected Andrews kept alive his membership in the old second class by making such payments as were required of him as a member of the second class, down to the time of his death, in May, 1900. Had Andrews' application been accepted, his payments would have been \$5.70 each month, and his total payments down to the time of his death would have been \$777. The payments required of him in the second class, and which he made from the date of his rejection to the time of his death, were fourteen in number, amounting to \$15.40.

No evidence was offered that, after the rejection of his application, Andrews offered to pay the amount that would have been due from him had he been transferred to the fourth class. It was admitted at the trial that if John Andrews was a member of the second class at the time of his death, his beneficiaries were entitled to only \$12, which sum the appellant tendered to appellee, and was rejected by them, before the bringing of this suit. It was also admitted that at the time of the death of Andrews there were a sufficient number of members in the fourth class to pay a membership certificate therein to the maximum amount. The case was tried by the court without a jury, and a judgment was rendered in favor of the appellees and against appellant for \$1,238.40, and it is from this judgment that this appeal is prosecuted.

The appellees contend that at the time when Andrews made application for transfer he was in perfect physical and mental health and condition; that he did all that he could do to effect his transfer, and that appellant arbitrarily and without any justification, valid or legitimate excuse, and simply because of his age, rejected his application for transfer, after having depleted the membership of the second class; and that, therefore, appellees were damaged in the sum sued for.

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Appellant filed its plea in abatement in which it set up substantially the facts in the case, and the laws of the appellant applicable thereto, as stated above, and also that, by reason of the facts set out, of which James Andrews had knowledge, and his acquiescence in the decision of the medical examiner in chief and of the board of control in rejecting his application, and by reason of his failure and refusal to appeal from the action of such board of control in the premises to the supreme lodge of the appellant, that the court had no jurisdiction of the subject-matter of the controversy. A demurrer to this plea was sustained. A demurrer to each paragraph of the complaint was then filed and overruled. Appellant answered in two paragraphs—(1) by general denial; (2) special facts of estoppel. A demurrer to said second paragraph was sustained, and the cause was tried upon the two paragraphs of the complaint and the general denial. Appellant assigns as errors the action of the court, (1) in sustaining appellees' demurrer to the plea in abatement; (2) in overruling the demurrer to the first and second paragraphs of the complaint, respectively; (3) in sustaining appellees' demurrer to the second paragraph of appellant's answer; (4) in overruling appellant's motion for a new trial.

In support of the plea in abatement, the position of appellant is that it had the right to establish the fourth class. It was the privilege of James Andrews to remain in the second class, or apply for transfer to the fourth class. When he was rejected as an applicant for transfer he had the right to appeal from the order of rejection to the supreme lodge. If he was dissatisfied with such rejection, it was his duty to appeal, and thus exhaust his remedies in the order. Failing to do this, neither he nor his representatives can come into this court and be heard to complain. The rule for which appellant contends—that the court will not entertain the complaint of a member of a society, as against such society, until such member has exhausted his

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remedies provided within the order—has been declared in the courts of last resort in a number of states; but, under the decisions of this State, the right of the aggrieved party to appeal beyond the board of control in organizations of the kind in question has been held to be permissive only. In other words, a member of a mutual benefit society is not required to exhaust his remedies within the order unless its by-laws make it obligatory upon him to do so. He may avail himself of the rights to appeal within the order, or resort to the courts of law. The by-laws in the case before us do not make an appeal to the supreme lodge obligatory, and therefore the court did not err in its ruling upon this pleading. *Bauer v. Samson*, 102 Ind. 262, 270; *Supreme Counsel, etc., v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298; *Voluntary Relief Dep., etc., v. Spencer*, 17 Ind. App. 123.

The complaint alleges that Andrews complied in every particular with every requirement of the lodge, and that his application for transfer was rejected arbitrarily and without just cause. The demurrer was properly overruled.

Is the finding of the court sustained by sufficient evidence? We are of the opinion that this must be answered in the negative. The complaint alleges that at the time of making his application for transfer, James Andrews was "in perfect physical and mental health and condition; * * * that on the 2d day of April, 1889, said Querner arbitrarily, and without any valid or legitimate excuse or cause, disapproved said examination, and rejected said application peremptorily, because of the advanced age of the said Andrews, and for no other reason or cause; * * * that, at the time said application for transfer was made, said Andrews possessed all the requirements demanded by the constitution and by-laws; * * * that he tendered all fees necessary, and fully complied with all the rules and regulations entitling him to be transferred; * * * that he was then, and continued to be up to the time of his

death, ready and willing to pay whatever assessments, dues, and fees were imposed upon the members." To sustain the finding of the court, these facts should have been proved. As to the physical and mental condition of the decedent, Dr. Gifford testified that he had known him for thirty or forty years, but gave no testimony as to his condition prior to his last sickness. Dr. Black testified from the examination made of decedent, answering in the plural to his physical and mental condition: "They were good. They were good, sound, and healthy." Dr. J. D. Sourwine testified that he knew the insured, but had never treated him as a physician; that he had the appearance of being a healthy man for his age. The other witnesses in behalf of the appellees were non-experts. They observed Andrews as one acquaintance observes another, and testified that he appeared to be in good health. Opposed to the testimony of Dr. Black there is the written report of Dr. Querner that the applicant's pulse rate was too high. Dr. Black's report gave the pulse rate. Dr. Querner said that it was too high. Nothing was said by the three physicians who testified in behalf of appellees about the pulse rate. One with excessive pulse rate may look well, and rarely have a day's sickness. Dr. Querner examined the application of Andrews, and rejected it because, for a man of his age, the pulse rate was excessive—"seventy-six when sitting, and eighty standing." The court can not say that this was or was not an excessive rate. The testimony of Dr. Querner was uncontradicted. It will not be questioned that the medical examiner might properly reject an applicant with an excessive pulse rate. It would be his duty to do so. A rejection upon such ground would not be arbitrary, but based upon reason. "Had the examiner refused him because he was not, in his judgment, possessed of the proper physical qualifications, it might well be that the examiner's opinion, in the absence of fraud or mistake, at least, would be final and conclusive against him, but no such question is here

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presented. On the contrary, the disapproval is arbitrary and without cause, solely by reason of his age, which, by the express letters of the society's law, is not a reason for rejection." *Sourwine v. Supreme Lodge, etc.*, 12 Ind. App. 447, 54 Am. St. 532. The constitution and by-laws require the applicant to be examined in certain ways, to be recommended by the local examiner, and approved by the medical examiner in chief.

Whether the insured was willing and ready to pay whatever was required of him as a member of the fourth class does not appear. The by-laws do not provide for the personal examination of the applicant by the examiner in chief. His action is based upon the written report of the local examiner, and the existence of the fact for which the application was rejected is not disputed. The proposition that the arbitrary rejection of an application for membership can not defeat the rights of the applicant is not to be disputed, but in the case before us the medical examiner in chief exercised his judgment as a physician upon the evidence, upon which alone he was authorized to act. No attempt was made to prove that the pulse rate was not excessive, nor that it was less than seventy-six when sitting and eighty when standing, nor that a man of the age of the insured should have a pulse rate as high as that given in the report of the local medical examiner.

Certain of the appellees, heirs of the decedent, were permitted to testify in behalf of the appellees. In his application for membership, he stated that he desired the benefit paid to his "legal heirs." Appellant claims that under §507 Burns 1901 said witnesses were incompetent. These witnesses were competent witnesses as to the health of decedent under *Lamb v. Lamb*, 105 Ind. 456.

From the facts as set out herein, it is manifest that Andrews regarded himself as a member of the second class, and acquiesced in the rejection of his application for membership in the fourth class. The supreme lodge was justi-

fied in putting that construction upon his action. For nine years he did not avail himself of the remedy granted him by the laws of the order—of appealing to the supreme lodge—nor did he appeal to the civil courts. Much stress is placed by appellees upon *Sourwine v. Supreme Lodge, etc., supra*. In that case a member in good standing of the first and second classes of the order requested to be transferred to the fourth class, and was arbitrarily refused admission into such class. Upon the death of the insured, in an action by the beneficiaries, the court held that equity would regard that as done which ought to have been done, and the appellant was entitled to the rights of membership, although not recognized by the officers; that equity would grant relief although the insured never, in his lifetime, compelled the transfer by mandate as he might have done; that, having complied with the rules of the insurer, he could not have been deemed to have acquiesced in the officer's wrongful conduct. In the case cited the applicant was rejected arbitrarily, when the medical examination showed him to be in perfect mental and physical condition, solely because of his age, which, by the express letter of the society's law, was not a reason for rejection. In that case the insured died within sixteen months after rejection of his application.

Upon the proposition of acquiescence, time is a factor to be taken into account. An inference not warranted upon a failure to assert a right within sixteen months may be drawn when the party has remained inactive for nine years, without any reason shown for the delay, and by his conduct has permitted, if not induced the association to believe that he was satisfied with the result reached.

Judgment reversed, with instruction to sustain appellant's motion for a new trial.

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LAPLANTE v. LAZEAR.

[No. 4,414. Filed October 13, 1903.]

LANDLORD AND TENANT.—Defective Premises.—Personal Injuries.—Damages.—An action may be maintained by a tenant against his landlord for personal injuries received by the breaking of defective steps leading to the house, where the house consisted of different apartments or tenements rented to two tenants, and the landlord kept possession of and exercised dominion over the steps as a common passageway for the tenants occupying the premises.

From Daviess Circuit Court; *M. S. Hastings*, Special Judge.

Action by Mary LaZear against Katherine LaPlante. From a judgment for plaintiff, defendant appeals. *Affirmed.*

C. E. Dailey, W. W. Moffett, C. K. Tharp and J. T. Goodman, for appellant.

A. J. Padgett, J. A. Padgett, W. A. Cullop and G. W. Shaw, for appellee.

WILEY, J.—Appellee was a tenant of appellant, and was injured by the breaking of alleged defective steps leading to the house. This action was to recover damages resulting from such injuries. The complaint was in two paragraphs, to each of which a demurrer was overruled. Answer in denial, trial by jury, verdict and judgment for appellee.

Errors relied upon for a reversal are the overruling of the demurrers to each paragraph of complaint, and overruling appellant's motion for a new trial.

The amended first paragraph of complaint avers that appellant was the owner of a certain lot upon which was a dwelling-house of two apartments; that each of said apartments consisted of three rooms down and one room upstairs; that appellee rented one of the apartments, and was occupying it as a tenant of appellant; that the other

apartment was leased to and occupied by another tenant; that said house had front steps, porch, door, and a hallway, used in common by both families residing therein, and were for the use of both families; that on the 20th day of June, 1900, while appellee and the other tenant were occupying and using said premises, one of the boards in one of the front steps leading to said house became out of repair; that appellant was notified to repair the same; that she came to examine it, and promised to make the necessary repairs; that said step prior thereto had been out of repair for a long time, and that appellant knew of such fact; that on the 23d day of June, 1900, appellee was desirous of going from the house to the street, and, while descending said steps to the walk below, avoided stepping on the aforesaid broken step, and stepped upon another in the course of steps, which board by her from the top step appeared to be safe and free from defects; that when she stepped upon said step the board broke and gave way suddenly under her weight, whereby she was thrown to the ground violently and permanently injured; that the board that broke was defective in this: That the under side thereof was decayed and cracked and weak, and on account thereof was unfit for the purpose for which it was used; that, it being on the under side, appellee could not see the defect, which condition she was unable to know by using the same as a means of ingress and egress to and from the common entrance to said house; that appellant knew at the time appellee became her tenant that said step was out of repair, or could have known it by the exercise of ordinary care and diligence; that she was negligent and careless in not having the same in good and safe repair for her tenants, who were required to use the same in common as a means of entering and leaving said house; that she was also negligent in failing to repair the same before appellee became her tenant, so that it would have been safe for use; that said steps were enclosed so that one using them could not see the under

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side of the boards, and hence appellee was unable to know the condition thereof; that said steps were not under the control or dominion of appellee for the reason that they were used in common by all of appellant's tenants occupying the house, it being a common passageway, and that appellant was still occupying the same under her dominion and possession for and on account of said reason; that by reason of said facts, her injury was caused without fault or negligence on her part, but wholly on account of the fault and negligence of the appellant. The second paragraph is not materially different from the first, and it is unnecessary to give even an abstract of it. Both paragraphs proceed upon the theory that appellant rented the house, with different apartments or tenements, to two different tenants, and that she kept possession of and exercised dominion over the steps, etc., as a common passageway for the tenants occupying the premises, and that she was charged with the duty of keeping such common passageway in repair, and safe for use, and that she failed to do so. It is only upon this theory, if at all, the complaint states a cause of action.

Appellant predicates her right to a reversal upon the theory that a landlord is not bound to make repairs in the absence of a covenant to do so, and further that there is no implied warranty or covenant that the demised premises are fit, or shall continue to be so, for the purposes for which they are leased. There is no doubt but that this is the general rule, as applicable to ordinary tenancies, for all of the authorities so hold. We mean by the expression of "ordinary tenancies" where property is leased to a single tenant. In such case the lessee has the exclusive possession of, and exercises absolute dominion over, the entire leased premises, in the absence of any reservation or exceptions expressed in the contract. We need not stop to cite authorities in support of this familiar proposition.

The only Indiana case cited by appellant upon the proposition that the complaint was insufficient to withstand a demurrer is *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255. That case is not decisive of the question here involved for two reasons: (1) In that case the injury resulted to the tenant by reason of a temporary covering of snow and ice on a stairway leading to her apartments, which obstruction was open and obvious, and for which the landlord was not in any way responsible. (2) The question here involved was not an issue in that case, and the court expressly said that it was not decided, and used the following language: "Whether a landlord hiring apartments to many tenants is liable for latent defects, or for fault of construction, or for permanent defects in the common passageways, we do not decide." The facts in the *Purcell* case were so dissimilar to the facts stated in the complaint before us that the decision there does not necessarily declare the law applicable to the facts here. The authorities are not in harmony, but the weight of them declares the rule to be that where the landlord leases separate portions of the same building to different tenants, and reserves under his control those parts of the building or premises used in common by all the tenants, he is under an implied obligation to use reasonable diligence to keep in a safe condition the parts over which he so reserves control. 18 Am. & Eng. Ency. Law (2d ed.), 220; *Phillips v. Library Co.*, 55 N. J. L. 307, 27 Atl. 478; *Alperin v. Earle*, 55 Hun 211, 8 N. Y. Supp. 51; *Rouillon v. Wilson*, 29 Hun App. Div. 307, 51 N. Y. Supp. 430; *Karlson v. Healy*, 38 Hun App. Div. 486, 56 N. Y. Supp. 361; *Blake v. Fox*, 17 N. Y. Supp. 508.

We quote the following from 18 Am. & Eng. Ency. Law (2d ed.), 220: "Thus it is held by the weight of authority that an implied duty is imposed upon the landlord to keep in repair common passageways and approaches retained under his control and used by the several tenants as

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the means of access to the portion of the premises demised to them, and that the landlord is liable for injuries received by a tenant because of the landlord's negligence in performing his duty. * * * The character of the liability has been said to be the same as that of any owner of real estate who holds out invitations or inducements to others to use his property, to exercise reasonable care and skill to render the premises reasonably fit for the uses which he has invited or induced others to make of them." This is the rule in England, Maine, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, and Missouri. The authorities are all collected and cited in a note following the above extract, and it is useless to cite them here.

This court in the case of *Hamilton v. Feary*, 8 Ind. App. 615, 52 Am. St. 485, discussed fully the general rule of a landlord to keep in repair leased premises, and to what extent he became liable for injury to a tenant by reason of defects, and then said: "To this general rule there are, however, several exceptions. Thus the landlord is liable where the premises contain some hidden defect or defects, or are infected with some noxious disease, rendering them dangerous or uninhabitable, and of which dangerous element or defects the landlord had some knowledge or information, but which were not open to the view of the tenant and of which he was ignorant or uninformed. And so the landlord is answerable where he controls or retains possession of a portion of the premises, or a portion is used in common by two or more tenants, and an injury occurs through some negligence or fault of the landlord upon that portion over which he has the control or which is used in common."

In a well-considered case the supreme court of Maine, upon facts similar to those at bar, decided the exact question before us, and held that the owner of several tenements leased to different tenants, with one stairway or passageway for the accommodation of all, and used in common

by them, was, in the absence of an express agreement to the contrary, in possession of such passageway, and bound to keep it in repair at his own expense, and was liable to a tenant for an injury happening through a defect therein, where the tenant was without fault. *Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124, 3 L. R. A. 458, 10 Am. St. 260. In that case the court said: "He [the landlord] was the owner of the tenements, and kept them for the purpose of profit. But to insure that, there must be some means of access to them. He preferred to make one passageway for all, rather than one for each. This was an invitation, an inducement for all who needed such accommodation, to come and pass over this passageway. It was a way provided for them to pass over precisely as a man provides a way for his customers to get to his place of business, and the same implied covenant to keep in safe and convenient repair must exist as much in one case as in the other." While there is some conflict in the decisions, real or apparent, the preponderance of authority is in harmony with the rule declared in the Maine case. In Massachusetts the question seems to have been definitely settled in accordance with that ruling. The same principle runs through all the cases—that the obligation to repair, in the absence of any express agreement, depends upon the right of possession, and that an appurtenant attached to and made for the accommodation of several different tenements leased to different tenants remains in the possession of the lessor, though the use of it goes to the lessees. *Sawyer v. McGillicuddy, supra*.

The case of *Inhabitants of Milford v. Holbrook*, 9 Allen (Mass.) 17, 85 Am. Dec. 735, was where an awning was made for and attached to a block containing three shops leased to different tenants. It was there held that though all had the use of the awning, yet the possession remained in the landlord, and he was liable for any defects in it.

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The case of *Shelby v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346, was where an entire building was leased to different persons in tenements under leases requiring them to make repairs; and yet it was held that the possession of the roof, however necessary to all, was not conveyed to any one of the tenants, nor to all jointly, and was therefore left in the owners, who were liable for new repairs.

Readman v. Conway, 126 Mass. 374, is also in point. That was where three tenements, with a platform in front of all, were leased to different persons. It was held that there was no presumption, in the absence of an agreement to that effect, that the tenants were to keep the platform in repair; that neither tenants required any exclusive right to use or control the part in front of his shop; and that there was no such leasing of the platform as would exonerate the landlord from responsibility for defects in it.

In the case of *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, it was held that where a landlord lets rooms in a building to different tenants, with a right of way in common over a staircase, he is bound to use reasonable care to keep such staircase in repair, and for failure to do so he became liable for injuries resulting from defects, provided the tenant was in the exercise of due care.

In *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. 293, it was held that a landlord who maintains outside steps and platform for the use in common for different parts of the building, and a visitor to one of the tenants, expressly invited by the tenant to come on a particular day for a particular purpose, is injured by a defect in the platform while passing over it, the landlord was answerable, for the visitor was using the platform in the tenant's right. The same rule is applied to a stairway which is kept and used in common by different tenants. *Sawyer v. McGillicuddy*, *supra*. See note to *Lindsey v. Leighton*, 15 Am. St. 201; Notes to *Poor v. Sears*, 26 Am. St. 272;

Nalley v. Hartford Carpet Co., 50 Am. Rep. 47; *Donohue v. Kendall*, 50 N. Y. Super. Ct. 386; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282.

In the case of *Payne v. Irvin*, 144 Ill. 583, 33 N. E. 756, it was held that the landlord was required to keep in repair that portion of the building over which he retained control for the protection of all persons, including his tenants.

Our attention has been called to cases in support of appellant's contention, but they are not sufficient to overcome the authorities of the numerous cases here cited. Some of those cases hinge upon temporary obstructions, such as accumulations of snow, ice, etc., and the principle there involved is not applicable to the facts here pleaded. The better reason and sounder principle are with the cases in support of appellee's contention. Each paragraph of the complaint was sufficient to withstand a demurrer.

Under the motion for a new trial two questions are discussed, viz.: (1) That the evidence is not sufficient to support the verdict; and (2) that the trial court erred in giving and refusing to give certain instructions. We can not disturb the judgment upon the evidence, for the reason that there is some evidence in the record to sustain it.

The parties each timely rendered to the court written instructions, and requested that they be given to the jury. To all of the instructions tendered by the appellee, which the court gave, the appellant objected and excepted. To the refusal to give some of the instructions tendered by appellant, she objected and excepted, and to all the instructions given by the court on its own motion, appellant excepted. Out of the numerous instructions so given and refused, counsel have discussed three and six, given by the court on its own motion; two, five, and nine, tendered by appellee and given; and nine and sixteen, tendered by appellant and refused. All of these instructions except nine and sixteen are in harmony with the authorities cited and the rule de-

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clared in what we have said in holding the complaint sufficient, and were applicable to facts disclosed by the evidence. In giving them the court correctly stated the law, and it is useless to review the authorities in support of them. Instruction number nine, tendered by appellant, was not pertinent to the issues nor applicable to the facts, was antagonistic to the rule above declared, and hence it was rightly refused. Number sixteen, while it may correctly state an abstract proposition of law applicable to ordinary tenancies, does not state the law under the issues and facts in this case, and was properly refused.

Judgment affirmed.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD
COMPANY v. HENDERSON.

[No. 4,458. Filed October 13, 1903.]

MASTER AND SERVANT.—Section Hands.—Fellow Servants.—Gangs of section hands employed during the day by the same railroad company, and who were proceeding homeward on two hand-cars after the close of the day's work, were fellow servants. *p. 445.*

SAME.—Defective Brakes on Hand-Car.—Proximate Cause.—Plaintiff averred in his complaint that he was one of a number of section hands on defendant's railroad; that at the close of the day's work he and five of his co-employees boarded a hand-car and started to a city six miles distant; that other co-employees to the number of from eight to twelve boarded a second hand-car, larger and swifter than the first, and followed in close proximity to the first; that by reason of defective brakes the second car became unmanageable, and ran into and derailed the first, causing plaintiff's injuries. On the trial the evidence as to whether the brakes were defective was conflicting, but there was no evidence whatever showing an attempt on the part of those in charge of the car to use the brakes. *Held*, that the defective brakes were not the proximate cause of the injury as alleged in the complaint, and that there could be no recovery. *pp. 442-446.*

From Jackson Circuit Court; *T. B. Buskirk*, Judge.

Action by James F. Henderson against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

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O. H. Montgomery, Edward Bratton, H. D. McMullen, C. W. McMullen, and H. R. McMullen, for appellant.

B. H. Burrell, H. H. Prince and S. A. Barnes, for appellee.

ROBY, J.—This action was brought to recover damages on account of personal injuries. There was a verdict for \$2,000, with answers to interrogatories. Judgment on the verdict.

The appellee was, as shown by the evidence, on April—, 19—, in the employment of appellant, working along its right of way, and at about 8:20 p. m. of said day started from a point six miles east of Seymour to go to said town. He and five others similarly engaged put a hand-car on the track, and propelled it west toward their destination, the day's work having been prolonged beyond the usual hours. A second hand-car was placed upon the track behind, and in a short time followed the first one. The second car was larger and faster than the first one. Its crew consisted of from eight to twelve men. The second car caught up with the first one a little while after they started. It made one stop before the accident; the first car made none. The evidence as to the rate of speed at which the cars were running at that time varies greatly. Witnesses testifying for appellee placed the rate of speed as low as five miles an hour. One witness testified that the cars were "running as fast as they could." The appellee testified in substance as follows: "When we started out we were not more than a rail's length apart. We had gone about half a mile or a quarter, I expect, when they caught up and bumped into us. We didn't stop when they bumped into us; just kept going on. We ran about the length of a T rail with the two cars against each other. Then they slacked up when they struck that car. Then we went on about a quarter before they struck us the next time. They kept running in and bumping onto us after we got across

Mutton creek for about a mile. They had bumped into us before we got to Mutton creek three different times, and after we got about a mile. They bumped into us about half a dozen times before we got to Mutton creek, and going the next mile they bumped into us. The next time when they bumped into us the two cars left the track. Both cars went off the track together when they bumped into us. They bumped into us while my car was going, and we were going pretty fast. We were going about fifteen miles an hour—fifteen or twenty miles an hour. I couldn't tell exactly, but near fifteen or twenty miles an hour; that is my best judgment. The car following us caused our car to be derailed, and both came off together. Just as they struck our car we both went off together. I suppose the other car knocked us off the track. They had bumped into us, and about the twelfth time they bumped into us they knocked us off the track. When they knocked us off I was helping to propel the car, working the lever, and was facing the west. The first I knew that they were coming, my back was toward them, and I heard them holler, 'Get out of the way.' The first I knew of their coming was when the car struck ours, except that I heard them say, 'Get out of the way.' The two cars locked together and raised the front end of our car, I think, over the rails. The two cars have handholds on each end, and they came together with such force they stuck these together. The handholds are near the center. They are fastened underneath, fastened on the arm of the car. They are of wood, and stick out about eight or ten inches. There are two on each end of the car. They are probably two inches through, and about a foot from the side of the car. I couldn't say whether Teepe's car run on the top or at the side of our car, but his car bore down on the rear end of ours and raised the front end up. The front wheels of the car went off first, and left the hind wheels of my car between the

rails; two of the wheels of my car were outside the rails, one front wheel and one hind wheel. I was thrown in front of the car."

The evidence further shows that those operating the second car knew the condition of the brake thereon; that they stopped the car by reversing the handles. No attempt was made to use the brake in order to avoid the collision. The foreman in charge of the second car, testifying for appellant, said that the brake was in fair condition, and that he could have stopped the car, at the rate it was running, within ten feet. Other evidence tends to show that the brake was not in good repair, and that the car could not be stopped by its use.

The paragraphs of complaint upon which the cause was tried contained two specific charges of negligence: (1) "And that the appellant had carelessly and negligently failed to equip said hand-car so following the one upon which the appellee was riding with proper and sufficient brakes to regulate and control its speed, and had permitted the brake on said car which was following the one on which the appellee was riding to become worn and out of repair, so that it would and could not regulate the movement of the car. And that at a certain place on the road where the descent was steep, that the car following the one on which the appellee was riding became unmanageable and uncontrollable, on account of the unsafe, insufficient, worn-out, and defective brake, and that it ran against the one on which appellee was riding with such force that the car was derailed, and thus he received his injuries." (2) That appellee's hand-car was defective by reason of a bent axle. The jury in answer to interrogatories found the non-existence of the last alleged defect. The finding is in accord with the evidence, and this specification of negligence does not, in view thereof, require further consideration. The effect of the general verdict is to find that the defective brake was the proximate cause of the injury

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complained of as alleged. The interrogatories are answered to that effect.

Before taking up the merits of the respective contentions, appellee's point that the evidence is not in the record is entitled to consideration. The bill containing the evidence was signed, as appears upon its face, on April 28, 1902. It was filed, as is shown by an order-book entry, on the following day—April 29. It does, therefore, sufficiently appear that the bill was filed after being signed by the trial judge. *Oster v. Broe*, 161 Ind. —.

The "gangs" of men upon the two hand-cars were in the employment of the same master, in the same work. The day's labor was ended, and they, with the section foreman, were going home. They were, within all the authorities, fellow servants. *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305; *Peirce v. Oliver*, 18 Ind. App. 87; *Hodges v. Standard Wheel Co.*, 152 Ind. 680; *Justice v. Pennsylvania Co.*, 130 Ind. 321. In order to fix liability upon appellant, it devolved upon appellee to establish the truth of that averment contained in his complaint to the effect that its negligence, as specified, caused the injury complained of; in other words, that the defective brake was its proximate cause. This was a question of fact. *Chicago, etc., R. Co. v. Martin, ante*, 308.

There is no room for other inference than that those operating the second car caused the collision, and the resulting injury to plaintiff, by the reckless manner in which the same was run. They knew the condition of the brake. In the absence of the testimony to the effect that it was said, when the stop before referred to was made, that the brake was not good, it is apparent that those using a hand-car not only can see and know the condition of its brakes, but would find it difficult to avoid knowing it. Taking the car as it was, it became their duty so to manage it as not to inflict injury upon others. Their recklessness in running at the rate of speed and in such proximity to

the first car as they did is wholly inexcusable. The rear car "bumped" the forward one repeatedly. It does not appear that any effort was made to avoid so doing. It did not, probably, occur to them that running against the more slowly moving car would derail it. That it did do so is an essential element to appellee's recovery. It appears that there was neither inclination nor attempt to use the brake before the collision. The appellant's total failure to equip its car with a brake would not, therefore, seem to be even a remote cause of the collision. It might, with more plausibility, be argued that appellant should respond in damages for having furnished its reckless employes with a hand-car geared to a speed faster than the one ahead of them, thereby making it possible for them to overtake the first car, than that it be held liable for furnishing a defective brake which they did not try to use. There is no evidence in the case tending to show that the alleged defect of the brake was the proximate cause of the injury. *Clarke v. Pennsylvania Co.*, 132 Ind. 199; *Neutz v. Jackson, etc., Coke Co.*, 139 Ind. 411.

This conclusion requires a reversal of the judgment, and renders the decision of other questions unnecessary.

Judgment reversed. Cause remanded, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent herewith.

BARRICKLOW v. STEWART, EXECUTOR.

[No. 4,506. Filed October 13, 1903.]

EXECUTORS AND ADMINISTRATORS.—Removal.—Petition.—Demurrer to Petition.—Bonds.—A demurrer for want of facts was proper to test the sufficiency of a petition for the revocation of the appointment of an executor because of an alleged invalid bond. p. 449.

SAME.—Bonds.—Foreign Surety Companies.—A petition for the removal of an executor on the ground that the petitioner is informed and believes that his bond is invalid because it purports to have been executed by a foreign surety company, and there is

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no authority on file in the county showing that the company is authorized to execute bonds, nor any authority on file in the county showing the authority of the alleged resident vice-president to execute bonds in behalf of said company, is insufficient; since such companies are governed by special statutes, §§5420-5494 Burns 1901, which do not require the agents thereof to file certificates in the counties in which they desire to do business, and even if the law required the filing of such certificate the failure to comply with such provision would not render the bond invalid. pp. 447-451.

From Ohio Circuit Court; N. S. Giran, Judge.

Proceeding by Ruth E. Barricklow for the removal of Stephen H. Stewart, executor of the will of Presley Gregg, deceased. From a judgment for defendant, plaintiff appeals. *Affirmed.*

W. W. Williams, J. B. Coles and Cynthia Coles, for appellant.

Davis & Davis, G. M. Roberts and W. R. Johnson, for appellee.

COMSTOCK, P. J.—Presley Gregg died testate at the city of Rising Sun, Ohio county, on the 9th day of April, 1902. His will was duly probated before the clerk of the Ohio Circuit Court, April 11, 1902. Upon the 15th day of April, 1902, Stephen H. Stewart, who was appointed executor of said will, appeared before the clerk and filed his statement of the probable amount of the estate of said decedent, to wit, \$20,000, and then and there tendered his bond in the sum of \$45,000, with the American Surety Company of New York as surety thereon, and signed by Horace E. Smith, resident vice-president, and attested by Earnest V. Clark, resident assistant secretary, which bond was approved and accepted by the clerk of said circuit court, and said Stewart was duly sworn as executor of said estate, and letters testamentary were made out and delivered to him by said clerk. All of said proceedings, affidavits, and statements, with a copy of said bond and the appointment of said executor, are set forth in the tran-

script. On May 5, 1902, being the first day of the May term of the said circuit court, the clerk reported to the judge thereof his proceedings in vacation as above set forth. Appellant filed her petition at said last-named date in said court, reciting the foregoing facts, and in addition that she was the sister and next of kin of the deceased; "that she is informed and believes that said bond so filed by said Stewart is invalid and of no force and effect, in this, to wit: that said bond purports to have been executed by the American Surety Company, a corporation of the state of New York, but there is no authority on file in this county showing that said American Surety Company is authorized to transact the business of executing surety bonds in the State of Indiana, nor is there any authority on file nor of record in this county showing the authority of Horace E. Smith, the alleged resident vice-president of said American Surety Company, to execute and deliver bonds on behalf of said company; and further that said bond, by reason of the facts aforesaid, is invalid and of no effect in this court, and that said Stewart, having failed to execute a good and sufficient bond in this matter as required by law to do, has forfeited his right to act as such executor, and the time in which he can file a good and sufficient bond has elapsed. Your petitioner further says that the estate of said Presley Gregg is extensive, and there is great danger of its being lost to said estate, to the injury of this petitioner, who, as stated, is the sister and next of kin to said decedent. She further shows that, as such next of kin to said Presley Gregg, she has commenced a suit in this court to contest the pretended will of said Presley Gregg, which action is now pending, and that Bertha May Barricklow, her daughter named in said will as a legatee and devisee, is a co-plaintiff; that, in view of the facts herein stated, she now asks the court to order and direct that the appointment of said Stephen H. Stewart as the executor of said pretended last will be set aside and

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revoked; that a special administrator be appointed to preserve the assets of said estate until the further order of the court herein, and that she be granted such other and further relief as she may be entitled to." To this petition appellee filed a demurrer "because said petition and objections of said Ruth E. Barricklow, praying the court to revoke the appointment of said executor, does not state facts sufficient to constitute a cause of action, or entitle the said Barricklow to the relief and judgment of ouster prayed for by her therein." The action of the court in sustaining this demurrer is assigned as error.

It is claimed that this demurrer should not have been considered, for the reason that it does not apply to the written objections filed, and does not state a statutory ground for demurrer. The petition asks the revocation of the appointment of the executor. The demurrer alleged a want of facts to constitute a cause of action; but appellant asserts that the petition did not pretend to be a complaint or cause of action, that it only placed the court in possession of facts upon which the law made it the duty of the court to withhold its approval of the clerk's acts, and that it could not be tested by demurrer. It is not material by what name the paper filed is called. It asks the court to revoke the appointment of the executor. The immediate effect of the revocation of that appointment would have been the ouster of the executor. The foregoing objections named are urged against the form of the demurrer. Whether the merits of the petition should have been questioned by motion to reject or to strike out, or by demurrer, we need not determine, if the same results by either course could have been correctly reached. The demurrer, however, does state a statutory ground—"want of facts sufficient to constitute a cause of action"—and fairly applies to the objections set out in the petition. But, without waiving the objection to the form of the

demurrer, it is contended by appellant that the facts stated in the petition were enough to inform the court that appellee's bond was insufficient to protect the estate. The petition avers that appellant "is informed and believes that the bond is invalid because it purports to have been executed by the American Surety Company, a foreign corporation, but that there is no authority on file in Ohio county showing that said company is authorized to execute bonds in the State of Indiana, nor any authority on file or of record in the county showing the authority of Horace E. Smith, the alleged resident vice-president of the company, to execute bonds in behalf of said company." Unless good cause is shown, the acts of the clerk in vacation should be ratified by the court. §2398 Burns 1901. Foreign surety companies may be received as surety on the bonds of executors, etc. §5494a Burns 1901. When such companies are governed by special regulations, the general law pertaining to foreign corporations is not applicable to them. *Rehm v. German Ins. & Sav. Inst.*, 125 Ind. 135; *Surety, etc., Assn. v. Elbert*, 153 Ind. 198. The American Surety Company and like corporations are governed by the special statutes, §§5480-5494 Burns 1901. That act does not require the agent to file his certificate in the office of the clerk of the county in which he desires to do business. It is claimed that the surety company was required under §5481 Burns 1901 to file power of attorney appointing the Auditor of State attorney in fact, etc.; by §3453 Burns 1901 to deposit in the clerk's office of the county the power of attorney under and by virtue of which they act as agents. But even if the law required the filing of the certificate of the agent in the office of the clerk of such county, the failure to comply with that provision would not render the bond invalid. *North Mercer, etc., Co. v. Smith*, 27 Ind. App. 472, and cases cited. A foreign corporation can not do business in this State without complying with the provisions of the statutes author-

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izing it to do such business, and escape liability upon its contract. *Phoenix Ins. Co. v. Pennsylvania R. Co.*, 134 Ind. 215, 20 L. R. A. 405, and cases cited; *Sparks v. National Masonic Acc. Assn.*, 73 Fed. 277; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Foster v. Charles Butcher Lumber Co.*, 5 S. D. 57, 58 N. W. 9, 23 L. R. A. 490, 49 Am. St. 859.

It is proper to add that the executor has complied with the requirements of the law. If, in the opinion of the trial court, the surety company was not authorized to act, appellant could have asked for no more than a new bond; but the bond was valid, and the court did not err in its ruling upon the demurrer. Judgment affirmed.

PENNSYLVANIA COMPANY v. DICKSON.

[No. 4,405. Filed May 26, 1903. Motion to modify opinion overruled October 13, 1903.]

CARRIERS.—*Shipment of Stock.—Delay.—Damages.—Railroads.*—Averments in a complaint against a carrier for damages for failing to deliver cattle shipped in time for a certain market, that the carrier knew and understood that the cattle were shipped for a certain market, and knew the time of the opening of the market and the manner of preparing cattle for sale thereat, and that if the cattle had been shipped with reasonable dispatch they could have been delivered in time for such market, render the complaint good, although the bill of lading expressly stipulates that the carrier did not contract to ship the cattle by any particular train or deliver them for any particular market. pp. 452-456.

SAME.—*Shipment of Stock.—Contract.—Connecting Lines.—Railroads.*—An instruction in the trial of an action against a railroad company for damages to cattle caused by delay in shipment, that the connecting carrier was the agent of the initial carrier in forwarding the stock, and that the initial carrier was liable for its acts, including delays, was erroneous, where the contract of shipment stated that the stock was received for transportation from place of delivery "to destination, if on the said carrier's line of railroad, otherwise to the place where said live stock is to be received

by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers for transportation," and the evidence showed that the initial carrier did not own or operate a line of road to the place of destination, but delivered the stock to a connecting carrier on whose line the delay occurred. pp. 456-459.

From Morgan Circuit Court; *M. H. Parks*, Judge.

Action by Katharine Dickson against the Pennsylvania Company. From a judgment for plaintiff, defendant appeals. *Reversed*.

S. O. Pickens, for appellant.

C. G. Renner and *J. C. McNutt*, for appellee.

WILEY, J.—Appellee was plaintiff below, and sued appellant to recover damages for the alleged negligent failure to carry and deliver at the Union Stock-Yards, in Chicago, five car loads of cattle in time for a particular market on a specified day.

The complaint was in two paragraphs. The first is based upon a written contract for the shipment of four car loads of cattle from Mooresville, Indiana, and the second is based upon a contract for the shipment of one car load of cattle from Martinsville, Indiana. Both of these contracts are made exhibits. The first may be designated as a "live stock contract" and the second as a "bill of lading." The negligence complained of was the failure to ship and deliver the stock in time for the market of December 28, 1898; the appellant having received the stock on the 27th. The "live stock contract" contains the following stipulations: That "the said shipper has delivered to the said carrier live stock of the kind and number, and consigned and destined by said shipper as follows: Seventy-eight cattle, four cars cattle M. Dickson & Co., Cr. J. C. Bohart Com. Co., Union Stock-Yards, Chicago, Illinois, for transportation from Mooresville, Indiana, to destination, if on the said carrier's line of railroad,

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otherwise to the place where said live stock is to be received by the connecting carriers for transportation to or toward destination; * * * that said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of eleven cents per 100 pounds, which is the lower published tariff rate based upon the express condition * * * that in the event of any injury, delay, or detention of said live stock, caused by the negligence of said carrier, or its employes, or its connecting carriers, or their employes, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock, while so detained." The bill of lading, which is the exhibit to the second paragraph, shows the receipt of one car load of cattle, "which said company agrees to carry to the said destination, if on its road, otherwise to deliver to another carrier on the route to said destination." Subdivision two of the bill of lading is as follows: "No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given." It is also provided in subdivision three, that "no carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee."

The record shows that Martinsville and Mooresville are situate on the Indianapolis & Vincennes Railroad, which is operated by appellant, and that it terminates at the Panhandle yards at Indianapolis. It is also shown that the appellant did not own or operate a line of road from Indianapolis to Chicago, and that freight shipped from

rails; two of the wheels of my car were outside the rails, one front wheel and one hind wheel. I was thrown in front of the car."

The evidence further shows that those operating the second car knew the condition of the brake thereon; that they stopped the car by reversing the handles. No attempt was made to use the brake in order to avoid the collision. The foreman in charge of the second car, testifying for appellant, said that the brake was in fair condition, and that he could have stopped the car, at the rate it was running, within ten feet. Other evidence tends to show that the brake was not in good repair, and that the car could not be stopped by its use.

The paragraphs of complaint upon which the cause was tried contained two specific charges of negligence: (1) "And that the appellant had carelessly and negligently failed to equip said hand-car so following the one upon which the appellee was riding with proper and sufficient brakes to regulate and control its speed, and had permitted the brake on said car which was following the one on which the appellee was riding to become worn and out of repair, so that it would and could not regulate the movement of the car. And that at a certain place on the road where the descent was steep, that the car following the one on which the appellee was riding became unmanageable and uncontrollable, on account of the unsafe, insufficient, worn-out, and defective brake, and that it ran against the one on which appellee was riding with such force that the car was derailed, and thus he received his injuries." (2) That appellee's hand-car was defective by reason of a bent axle. The jury in answer to interrogatories found the non-existence of the last alleged defect. The finding is in accord with the evidence, and this specification of negligence does not, in view thereof, require further consideration. The effect of the general verdict is to find that the defective brake was the proximate cause of the injury

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complained of as alleged. The interrogatories are answered to that effect.

Before taking up the merits of the respective contentions, appellee's point that the evidence is not in the record is entitled to consideration. The bill containing the evidence was signed, as appears upon its face, on April 28, 1902. It was filed, as is shown by an order-book entry, on the following day—April 29. It does, therefore, sufficiently appear that the bill was filed after being signed by the trial judge. *Oster v. Broe*, 161 Ind. —.

The "gangs" of men upon the two hand-cars were in the employment of the same master, in the same work. The day's labor was ended, and they, with the section foreman, were going home. They were, within all the authorities, fellow servants. *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305; *Peirce v. Oliver*, 18 Ind. App. 87; *Hodges v. Standard Wheel Co.*, 152 Ind. 680; *Justice v. Pennsylvania Co.*, 130 Ind. 321. In order to fix liability upon appellant, it devolved upon appellee to establish the truth of that averment contained in his complaint to the effect that its negligence, as specified, caused the injury complained of; in other words, that the defective brake was its proximate cause. This was a question of fact. *Chicago, etc., R. Co. v. Martin, ante*, 308.

There is no room for other inference than that those operating the second car caused the collision, and the resulting injury to plaintiff, by the reckless manner in which the same was run. They knew the condition of the brake. In the absence of the testimony to the effect that it was said, when the stop before referred to was made, that the brake was not good, it is apparent that those using a hand-car not only can see and know the condition of its brakes, but would find it difficult to avoid knowing it. Taking the car as it was, it became their duty so to manage it as not to inflict injury upon others. Their recklessness in running at the rate of speed and in such proximity to

rails; two of the wheels of my car were outside the rails, one front wheel and one hind wheel. I was thrown in front of the car."

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The paragraphs of complaint upon which the cause was tried contained two specific charges of negligence: (1) "And that the appellant had carelessly and negligently failed to equip said hand-car so following the one upon which the appellee was riding with proper and sufficient brakes to regulate and control its speed, and had permitted the brake on said car which was following the one on which the appellee was riding to become worn and out of repair, so that it would and could not regulate the movement of the car. And that at a certain place on the road where the descent was steep, that the car following the one on which the appellee was riding became unmanageable and uncontrollable, on account of the unsafe, insufficient, worn-out, and defective brake, and that it ran against the one on which appellee was riding with such force that the car was derailed, and thus he received his injuries." (2) That appellee's hand-car was defective by reason of a bent axle. The jury in answer to interrogatories found the non-existence of the last alleged defect. The finding is in accord with the evidence, and this specification of negligence does not, in view thereof, require further consideration. The effect of the general verdict is to find that the defective brake was the proximate cause of the injury

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complained of as alleged. The interrogatories are answered to that effect.

Before taking up the merits of the respective contentions, appellee's point that the evidence is not in the record is entitled to consideration. The bill containing the evidence was signed, as appears upon its face, on April 28, 1902. It was filed, as is shown by an order-book entry, on the following day—April 29. It does, therefore, sufficiently appear that the bill was filed after being signed by the trial judge. *Oster v. Broe*, 161 Ind. ———.

The "gangs" of men upon the two hand-cars were in the employment of the same master, in the same work. The day's labor was ended, and they, with the section foreman, were going home. They were, within all the authorities, fellow servants. *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305; *Peirce v. Oliver*, 18 Ind. App. 87; *Hodges v. Standard Wheel Co.*, 152 Ind. 680; *Justice v. Pennsylvania Co.*, 130 Ind. 321. In order to fix liability upon appellant, it devolved upon appellee to establish the truth of that averment contained in his complaint to the effect that its negligence, as specified, caused the injury complained of; in other words, that the defective brake was its proximate cause. This was a question of fact. *Chicago, etc., R. Co. v. Martin, ante*, 308.

There is no room for other inference than that those operating the second car caused the collision, and the resulting injury to plaintiff, by the reckless manner in which the same was run. They knew the condition of the brake. In the absence of the testimony to the effect that it was said, when the stop before referred to was made, that the brake was not good, it is apparent that those using a hand-car not only can see and know the condition of its brakes, but would find it difficult to avoid knowing it. Taking the car as it was, it became their duty so to manage it as not to inflict injury upon others. Their recklessness in running at the rate of speed and in such proximity to

rails; two of the wheels of my car were outside the rails, one front wheel and one hind wheel. I was thrown in front of the car."

The evidence further shows that those operating the second car knew the condition of the brake thereon; that they stopped the car by reversing the handles. No attempt was made to use the brake in order to avoid the collision. The foreman in charge of the second car, testifying for appellant, said that the brake was in fair condition, and that he could have stopped the car, at the rate it was running, within ten feet. Other evidence tends to show that the brake was not in good repair, and that the car could not be stopped by its use.

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INDIANA MANUFACTURING CO. v. WELLS, BY
NEXT FRIEND.

[No. 4,462. Filed October 13, 1903.]

MASTER AND SERVANT.—Personal Injuries.—Action by Minor.—Complaint.—In an action for personal injuries sustained by plaintiff while operating certain machinery of defendant, averments that plaintiff “was fifteen years old, inexperienced in mechanical labor, and incapable and incompetent to judge of the danger incident to the operation of such machinery,” do not supply the place of an averment of negligent failure to instruct plaintiff in the use of the machinery. pp. 460, 461.

SAME.—Factory Act.—Failure to Guard Machinery.—Negligence.—Under §9 of the factory act of 1899 (Acts 1899, p. 231), an averment that defendant failed to guard properly his machinery is a sufficient charge of negligence. p. 462.

SAME.—Factory Act.—Failure to Provide Belt-shifters.—Under the factory act of 1899, the mere failure to provide belt-shifters does not create a liability, the liability for such failure arises when the inspector’s order to furnish them has not been complied with. p. 462.

SAME.—Failure of Master to Guard Machinery.—Common Law Liability.—In an action for personal injuries alleged to have been caused by the negligent failure of the master to guard dangerous machinery and to provide belt-shifters, a complaint which fails to allege plaintiff’s want of knowledge of the condition of the machinery and the dangers resulting therefrom does not state a cause of action under the common law. p. 463.

From Miami Circuit Court; *J. T. Cox*, Judge.

Action by Carl H. Wells, by next friend, against the Indiana Manufacturing Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

J. C. Blacklidge, C. C. Shirley, Conrad Wolf and N. N. Antrim, for appellant.

John Stapleton and F. D. Butler, for appellee.

ROBINSON, C. J.—Appellee recovered a judgment for a personal injury received while operating a machine in appellant’s factory. He avers in his complaint that he is fifteen years of age, inexperienced in mechanical labor and the construction and operation of machinery, and in-

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competent to judge of the danger incident thereto, which appellant knew; that he was put to work at a machine containing two sets of sharp steel knives or bits which were attached to shafting with belt and pulley attachment, and which were made to revolve with great force and rapidity by steam, over which appellee had no control; that by reason of its construction and gearing the machine was of a dangerous character when in operation; that a part of the duty required of him by appellant was frequently to oil certain parts of the machine; that appellant had negligently and carelessly constructed and placed the machine in such position that, in order to oil it, appellee was compelled to and did reach over the revolving knives across to the opposite side and under the platform while the machine was running; and that appellant had "negligently, wrongfully, and unlawfully failed and neglected to furnish and supply or cause to be furnished and supplied, in connection with said machine, belt-shifters or other mechanical contrivances for the purpose of throwing on or off the belts or pulleys, and thereby stopping the movement and action of said knives, chisels, and bits of said machine, and properly to safeguard, or to place any safeguards whatever about said knives, chisels, and bits;" that while working with the machine, and attempting to oil the same, as above stated, his hand came in contact with the knives, whereby he was injured.

The pleading contains no charge of negligence in failing to instruct appellee how to operate the machine and avoid danger. The averments that appellee was fifteen years old, inexperienced in mechanical labor, and incapable and incompetent to judge of the danger incident to the operation of such machinery, do not supply the place of an averment of negligent failure to instruct appellee in the use of the machinery. The presumption that appellant did its duty, and did instruct him, is of equal weight with the presumption that it did not instruct him. From

the facts averred the inference does not necessarily follow that appellant negligently failed to instruct appellee. The pleading does not present any issue of negligence because of failure of appellant to instruct appellee in the use of the machinery.

The complaint charges as acts of negligence, failure to provide belt-shifters for dangerous machinery, and failure properly to guard the machinery. The action seems to be founded upon §9 of the factory act in force April 27, 1899 (Acts 1899, p. 231, §7087i Burns 1901). That act makes it the duty of the owner of a manufacturing establishment "to furnish and supply, or cause to be furnished and supplied therein, in the discretion of the chief inspector, where machinery is used, belt-shifters or other safe mechanical contrivances for the purpose of throwing on or off belts or pulleys; and whenever possible, machinery therein shall be provided with loose pulleys; all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded." This statute characterizes certain machinery as dangerous, and requires of the employer a certain specific duty. The failure to perform that duty is negligence. The averment that appellant failed properly to guard the machinery charges the omission of a statutory duty, and is, under the statute, a sufficient charge of negligence. *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479; *Monteith v. Kokomo, etc., Co.*, 159 Ind. 149, 58 L. R. A. 944.

The statute provides that certain machinery shall be properly guarded. It does not provide absolutely that belt-shifters shall be supplied, but that they shall be supplied "in the discretion of the chief inspector." There is no authority for saying that these words of the statute are meaningless, and may be ignored in its construction. The mere failure to provide belt-shifters does not create a statutory liability, but liability under the statute arises when the in-

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spector's order to furnish them has not been complied with. *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367. The doctrine in this case was in part disapproved in *Monteith v. Kokomo, etc., Co., supra*, but not upon the above point.

Nor does the complaint, in the above particulars, show a common law liability. In pleading the statutory liability it would not be necessary to aver that appellee had no knowledge of the unguarded condition of the machinery and of the absence of a belt-shifter and the dangers resulting therefrom. An averment of failure to perform the statutory duty is sufficient. *Monteith v. Kokomo, etc., Co., supra*. But in pleading the employer's neglect of a common law duty such averments are necessary. If the machinery was not properly guarded, and there was no belt-shifter, and it was dangerous to operate the machine in that condition, and appellee knew these facts, he assumed the risk. To show a liability at common law, want of knowledge must be averred and proved. The trial court, in the instructions to the jury, proceeded upon the theory that the pleadings stated a cause of action under the statute and at common law, but did not keep in view the distinction between neglect of a common law duty and the neglect of a specific statutory duty. The instructions as to the common law liability say nothing as to appellee's knowledge concerning these omissions and the dangers resulting therefrom.

The motion for a new trial should have been sustained. Judgment reversed.

FT. WAYNE TRACTION COMPANY v. MORVILIUS.

[No. 4,502. Filed October 13, 1903.]

CARRIERS.—Street Railroads.—Injury to Passenger while Alighting from Car.—The strict obligation of the carrier of passengers continues not merely while the passenger is being received and being carried, but also while he is leaving or alighting from the carriage or car; and an electric railway company operating its cars on tracks in a city over a street in which excavations were made by the city adjacent to the tracks is liable for injuries received by a passenger in getting off a car stopped to let off passengers opposite such excavation, where no notice or warning was given the passenger of the excavation.

From Adams Circuit Court; *R. K. Erwin*, Judge.

Action by Frank Morvilius against the Ft. Wayne Traction Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

J. M. Barrett and S. L. Morris, for appellant.

Henry Colerick, for appellee.

BLACK, J.—The appellee recovered judgment against the appellant for damages for a personal injury.

The complaint showed at length and with particularity that the appellee was a passenger on the car of the appellant, which was propelled by electricity westward on Main street, and had paid his fare, and had received from the conductor a transfer ticket entitling him to be carried on another car on Calhoun street northward from its intersection with Main street, between 9 and 10 o'clock at night. The car stopped on Main street, on the east line of Calhoun street, and the appellee descended for the purpose of taking the other car, then waiting for passengers so transferred. Main street, at that place between the car track thereon and the curb of the sidewalk, upon each side of the street, had been dug down and excavated more than eighteen inches, leaving the foundation or bed of the street at that

Ft. Wayne Traction Co. v. Morvilius.

place three feet below the nearest step of the car. The appellee had not been in that part of the city for many months, and did not know of such condition of the street. The night was dark, and the shadow of the car from the lights on Calhoun street covered the excavation at the place of the steps. The appellee left his seat and went to the car step to leave the car. He placed his left foot on the lowest step, and reached with his right foot for the ground, and discovered that he could only reach it with his toe; and having the whole of his weight placed upon his left foot, he could not remove it in order to jump, when by reason of such condition his body became overbalanced, and he fell to the ground from the step, upon his face and right hand, striking the ground violently, and then rolled on his back, when, upon attempting to arise, he found that his right hand and arm were useless and helpless by reason of the fall. It was alleged that the appellant knew, or ought to have known, that the street had been so excavated at the point where it stopped its car for its passengers to alight, but that the appellant knowing of such dangerous condition of the street at that point, and knowing, as it did, that it was dangerous for passengers to alight from the car at that point, carelessly and negligently stopped at that point for its passengers to leave the car, knowing of the danger as aforesaid, and carelessly and negligently did so without providing any light or other warning to its passengers, and that its conductor and those operating its car negligently and carelessly omitted and failed to warn the appellee or any of its other passengers on that car of such dangerous condition of the street at that point to those attempting to leave the car there. The complaint contained other averments relating to the appellee's injury, and concerning the amount of damages.

Counsel for appellant have discussed the complaint and the evidence, and an instruction which the court refused to

give to the jury. The substance of the whole discussion is thus stated in the appellant's brief: "The record in this case presents clearly and cleanly for decision this question: Where an electric railway [company] operates its cars on tracks in a city, and excavations are made by the city on parts of the street adjacent to such track, is it the duty of the servants of the railway to notify passengers alighting from the cars of such excavation, when the cars are stopped to let off passengers immediately opposite such excavation? We insist not." The case to which counsel have called our attention, in which the person complaining of the common carrier of passengers was injured by reason of the defectiveness of the street after having alighted from the conveyance, and while proceeding along or across the street, and where, therefore, the relation of carrier and passenger had wholly terminated, is not in point in the case at bar. The strict obligation of the carrier of passengers continues not merely while the passenger is being received and being carried, but also while he is leaving or alighting from the carriage or car under such circumstances that it may properly be said of him that he is being so discharged or so landed by the carrier. The relation of carrier and passenger had not ceased when the appellee received his injury under the circumstances detailed in the complaint.

The action does not proceed upon the theory of responsibility of the appellant for the excavated and dangerous condition of the street. The plaintiff does not rely upon the theory of the actionable wrong of a person or corporation in producing or maintaining such a condition of the street, resulting in injury as stated in the complaint; but the case proceeds upon the theory of the responsibility of the carrier for discharging its passengers at such a dangerous place, of whose dangerous character it knew or was bound to take notice, without properly guarding him from injury, or warning him of the danger of which he was ignorant, and concerning which, under the circumstances, he was not

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bound to take notice. The suggestion of the appellant concerning the nature of the action is palpably erroneous. The appellant, through its servants in charge of the car, having knowledge of the condition which rendered the alighting in the dark from the car dangerous for passengers who were ignorant of the excavation, owed the passenger the duty of taking reasonable precautions or giving reasonable warning for the protection of the passenger.

Common carriers of passengers, including street railway companies, are bound to exercise the highest degree of care and skill and the utmost foresight in the performance of their duty as carriers in receiving, transporting, and discharging their passengers, and are responsible for any injury to a passenger through neglect of any reasonable precaution for the prevention of such injury. *Citizens St. R. Co. v. Twiname*, 111 Ind. 587.

Judgment affirmed.

UNION TRACTION COMPANY OF INDIANA v.
BARNETT.

[No. 4,233. Filed April 28, 1903. Rehearing denied October 13, 1903.]

APPEAL.—*Amendment of Complaint Pending Trial.*—*Review.*—An objection to the action of the court in permitting, after trial was begun, an amendment to the complaint, will not be reviewed on appeal, where there is no record entry showing that an amended complaint was filed. pp. 468, 469.

SAME.—*Service of Process.*—*Presumption.*—In the absence of a showing to the contrary, it will be presumed on appeal that the summons was served upon the defendant named in the complaint. p. 469.

TRIAL.—*General Verdict.*—*Answers to Interrogatories.*—*Conflict.*—If the antagonism between a general verdict and the answers to interrogatories returned therewith is not such as to be beyond the possibility of removal by any evidence admissible under the issues, the general verdict must stand. p. 471.

SAME.—*General Verdict.*—*Answers to Interrogatories.*—*Conflict.*—*Injury to Pedestrian.*—*Street Railway.*—In an action by a pedestrian against

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a street railway company for injuries sustained while walking across a defective street, the jury returned a general verdict for the plaintiff, and answers to interrogatories showing that the defendant in laying its track had taken up and relaid the brick pavement at the street crossing, and in doing so had not set the bricks as close together as practicable, nor tamped down the gravel between the bricks solidly enough; that the street was lighted, and near the crossing where plaintiff was injured, a red lantern was burning; that the plaintiff was familiar with the street, and knew the work was being done, and knew the significance of the red light; that she crossed the street at the time without looking where she was walking; that there was no red light or danger signal immediately on the crossing to warn plaintiff that it was dangerous; and that plaintiff could not see the loose bricks which caused her to fall. *Held*, that the answers to interrogatories were not in irreconcilable conflict with the general verdict. pp. 469-472.

APPEAL.—*Exclusion of Evidence.*—*Harmless Error.*—It is harmless error to strike out proper evidence, where by answers to interrogatories the jury found as a fact that which was sought to be established by the evidence stricken out. p. 472.

SAME.—*Admission of Evidence.*—*Notice.*—*Harmless Error.*—In an action by a pedestrian against a street railway company for personal injuries sustained by reason of the failure of the defendant to restore a paved crossing to its former condition, the admission of evidence introduced by plaintiff for the purpose of showing that defendant was notified of the condition of the crossing can not be harmful, since it was the duty of the defendant company to restore the street to its former condition, and it was bound to know whether it had done so. p. 472.

From Henry Circuit Court; *W. O. Barnard*, Judge.

Action by Josephine Barnett against the Union Traction Company of Indiana. From a judgment for plaintiff, defendant appeals. *Affirmed*.

J. A. VanOsdol, W. A. Kittinger, M. E. Forkner and G. D. Forkner, for appellant.

E. F. Ritter, for appellee.

ROBINSON, J.—Appellant appeals from a judgment in appellee's favor for personal injuries.

Objection is first made to the action of the court in permitting, after the trial was begun, an amendment to the complaint, which consisted in inserting in the complaint

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after the words "Union Traction Company," the words "of Indiana." The record contains a single paragraph of complaint. It contains no amended complaint, nor is there any record entry that an amended complaint was filed.

The complaint begins: "Josephine Barnett complains of the Union Traction Company of Indiana, and says," etc. It does not appear upon whom summons was served, and, in the absence of some showing to the contrary, it is presumed that it was served upon the defendant named in the complaint.

On August 15, 1900, and for about two weeks prior thereto, appellant was constructing its road north and south along Pendleton avenue, making an excavation about sixteen inches deep and eight feet wide, and extended the same across State street, a brick paved street. State street was paved north in the avenue to the inner line of the sidewalk, and made a walkway across the avenue on a line with the north sidewalk on State street. The brick street and walkway were reconstructed by appellant substantially as they were before, the bricks reset, and the cracks filled with sand, and the same tamped down, except that the bricks were not set as close as practicable, were laid loosely, and the "gravel was not tamped solid enough." On the above date there were lights in a store building at the northeast corner of this street crossing, which lighted the crossing where appellee was injured, and also lights at the southeast corner, and a street lamp burning at the southwest corner, which lighted the crossing; also a red lantern lighted, about two feet high, and placed on top of a barrel between the rails of the track, and about a foot north of the edge of the cross-walk; also a red light burning at the edge of the south cross-walk. Appellee lived on Pendleton avenue, about one-half square north of the crossing, and in front of her residence the avenue had been excavated for about two weeks prior to the above date; that frequently before that time she had observed the red signal lights placed on the

excavation at different points, and had observed the nature and character of the work, and had observed also that the brick paving had been removed at the street crossing, and that the excavation had been made for the construction of the road. About 8:30 o'clock in the evening, appellee walked from her home to the street crossing to the north walk on State street, and started directly across Pendleton avenue, walking in the usual and ordinary way, looking beyond Pendleton avenue at the lights along State street, and westward along the north side of State street. While crossing Pendleton avenue, appellee did not look down and observe the character and condition of the cross-walk at any time after entering upon the same, and before she fell. There was nothing to prevent her from seeing the red signal light, which she knew indicated danger. She also knew that the presence of the red lights meant the exercise of care when traveling in the vicinity of such lights, and that she was required to exercise the faculty of sight when traveling in their vicinity; that she did not look at any time before crossing Pendleton avenue to see whether there was any signal light near the north cross-walk; that while crossing she did not look down and observe where she was stepping at any time before she received the fall, and that at the time she was possessed of good eyesight; that at the time and before she received the injury, and while she was walking across the crossing, she did not look and observe the condition of the street and the character of the walk that she was traveling over; that within fifteen or twenty minutes, and again within an hour, after receiving the injury, she crossed the street without hindrance and without accident.

The above answers to interrogatories show that for some time prior to the injury appellee knew the nature of the work that was being done in the street; that she had seen the red lights and knew their significance; that one of these lights was at the time burning near the edge of the walkway over which she was passing, and that there was

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nothing to prevent her from seeing it. There were lights also at three different corners of the crossing; she knew the crossing had been torn up; there was nothing to prevent her seeing the red signal light, which she knew indicated danger, and which she also knew meant the exercise of care and the faculty of sight when traveling in the vicinity of such a light. It also appears that she proceeded over the walkway without giving heed to the conditions surrounding her and without looking to see where she was walking.

The jury, by its general verdict, determined every question essential to appellee's right of recovery in her favor. If the general verdict, with every reasonable intendment in its favor, is to be overthrown by the special answers to interrogatories, it must appear that the jury's finding upon particular questions of fact is so clearly antagonistic to the general verdict that the two can not coexist. The answers to interrogatories must be construed strictly, and without favorable intendment, against the moving party. If the answers are inconsistent as between each other, or if the antagonism between them and the general verdict is not such as to be beyond the possibility of removal by any evidence admissible under the issues, the general verdict must stand. *Citizens St. R. Co. v. Hoop*, 22 Ind. App. 78; *Fitzmaurice v. Puterbaugh*, 17 Ind. App. 318; *McCoy v. Kokomo R., etc., Co.*, 158 Ind. 662.

The answers do not find the exact nature of the defect that caused the injury, nor do they find that it was such that a person must have seen it when passing over the walkway. It appears that appellant had reconstructed the crossing, had replaced the brick, and had left the walkway open for travelers to pass over. There were no red signal lights upon the crossing itself. There was nothing upon or near the crossing to warn a traveler that the crossing itself was dangerous. Appellee had the right to presume that the crossing was safe, and, in the exercise of due care, to act upon that presumption. The jury found by their general

verdict that in passing over the crossing appellee exercised such care as a reasonably prudent person would exercise under like circumstances, and there is evidence authorizing such a finding. Nor is there anything in the answers to interrogatories that is antagonistic to, or in irreconcilable conflict with, such finding. There is evidence that the surface of the street appeared to be restored as before it was taken up, and that appellee did not and could not see that the brick upon which she stepped was loose and dangerous; that the bricks when replaced were not placed as closely together as they should have been; that they were laid loosely, and the gravel not tamped sufficiently, and that when appellee stepped upon them her foot went down sideways between the bricks, causing her to fall. The motion for judgment upon the answers was properly denied.

No harmful error was committed against appellant in striking out the answer of a witness to the effect that he never missed the red lights at the crossing, and in not permitting appellant to prove by the same witness that he drove back and forth over the crossing and noticed the red lights there, and that they were never absent to his knowledge, for the reason that the jury found as a fact that the red lights were burning at the crossing the night of the injury.

Objection is made to certain evidence introduced for the purpose of showing that appellant was notified of the condition of the crossing. We fail to see how any harmful error was committed in this respect. The appellant company was sole defendant. The condition of the crossing resulted from the alleged unskilful reconstruction of the crossing by appellant after it had been torn up for the construction of its tracks. It was the duty of the company to restore the street as nearly as practicable to its former condition. It was bound to know whether it had done so. Had the municipality been joined as a defendant, a different question might be presented. The evidence in-

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troduced in support of the averments of the complaint was to the effect that, after the bricks had been taken up in the street and track constructed, the bricks had been unskilfully and insecurely replaced by appellant, and left in an unsafe condition.

Judgment affirmed.

THE OLD WAYNE MUTUAL LIFE ASSOCIATION v.
FLYNN.

[No. 4,007. Filed October 14, 1903.]

JUDGMENTS.—*Foreign Judgments.—Enforcement.—Jurisdiction of Court.—*

The presumption of the jurisdiction of a court of record and general jurisdiction of another state of the subject-matter and of the parties does not arise where the averments of the pleading seeking the enforcement of the judgment states the facts on which jurisdiction depends. pp. 474, 475.

SAME.—*Foreign Judgments.—Jurisdiction.—*A complaint to enforce a judgment against an insurance company of this State obtained in another state averred that the writ was personally served upon the deputy insurance commissioner. The statute of the foreign state pleaded provides that process shall be served on the insurance commissioner, or the party designated by him, or the agent specified by said company to receive services of process. It was averred that the deputy was "legally authorized" and asserted that by a different section the deputy insurance commissioner was empowered to perform the acts attached to the office in certain contingencies, but the section of the statute was not pleaded. *Held*, that the facts pleaded show that the court rendering the judgment did not have jurisdiction of the defendant. pp. 474-476.

From the Superior Court of Marion County (52,553);
J. M. Leathers, Judge.

Action by Enos Flynn against the Old Wayne Mutual Life Association. From a judgment for plaintiff, defendant appeals. *Reversed*.

R. W. McBride, *C. S. Denny* and *C. E. Averill*, for appellant.

H. W. Bullock, *Hiram Teter* and *B. F. Watson*, for appellee.

ROBY, J.—This action is founded upon a judgment alleged to have been rendered in favor of appellee and against appellant by the common pleas court of Lackawanna county, Pennsylvania. Whether the judgment is valid depends upon whether the Pennsylvania court is shown to have had jurisdiction of the person of appellant. The suit therein brought was one to recover upon a policy of insurance issued by appellant, an Indiana corporation, by its agents in Pennsylvania, to a citizen of that state, upon the life of another citizen thereof. The court is averred to have been one of record and of general jurisdiction as the name implies. The presumption therefore is that it had jurisdiction of both the subject-matter and all the parties. *Gates v. Newman*, 18 Ind. App. 392; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959. Such jurisdiction may be questioned in this State notwithstanding the record. The jurisdiction of a foreign court is always open to inquiry, and a court of another state in this respect is regarded as foreign. *Pond v. Simons*, 17 Ind. App. 84; *Grover, etc., Mach. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670.

The distinction between collateral and direct attacks as applicable to judgments rendered in this State is not therefore of controlling importance. The presumption of jurisdiction does not arise when the record shows the facts upon which it depends, but the record will be taken as expressive of the entire truth. The same proposition applies to a pleading in which averments relative to jurisdictional facts are contained. *Coan v. Clow*, 83 Ind. 417; *Galpin v. Page, supra*; *Pressley v. Harrison*, 102 Ind. 14, 23.

It is averred "that said writ was personally served on said defendant association by the proper officer having the writ for service, giving to S. W. McCulloch, deputy insurance commissioner of said commonwealth, at the office of the insurance commissioner of said commonwealth, a true attested copy of said writ and statement aforesaid,

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and making the contents known to him, the said McCulloch being legally authorized to receive and receipt said regular service as and for the insurance commissioner of said commonwealth, as the lawful representative and agent of said defendant association resident in said commonwealth for the purpose of receiving and receipting service of process, including the aforesaid writ, for said defendant association." The sufficiency of the complaint and the validity of the judgment are asserted on the theory that service upon the deputy insurance commissioner was service upon his principal. The Pennsylvania statute "to establish an insurance department" was in part incorporated in appellee's complaint. Only one section thereof—the thirteenth—was so pleaded. Appellee asserts that by a different section the deputy insurance commissioner was empowered to perform the acts attached to the office in certain contingencies, citing *McCann v. Old Wayne, etc., Ins. Co.*, 10 Pa. Dist. Rep. 560; *Reynolds v. Supreme Conclave*, 9 Pa. Dist. Rep. 622.

The courts of this State do not take judicial notice of the statutes of another state. *Tyler v. Kent*, 52 Ind. 583.

The statute pleaded stipulates that no insurance company not of that state shall do business therein until it has filed with the insurance commissioner a written stipulation agreeing that any legal process affecting the company "served on the insurance commissioner, or the party designated by him, or the agent specified by said company to receive service of process for said company, shall have the same effect as if served upon the company." It is not averred that service was made upon the insurance commissioner, or upon any party designated by him, or upon any agent appointed by the appellant. Where a particular method of serving process is pointed out by statute, that method must be followed in order to secure jurisdiction of the person. *McCormack v. First Nat. Bank*, 53 Ind. 466. The averments that the deputy was "legally

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authorized," and that he was the "lawful representative" of the appellant company, are legal conclusions, the correctness of which depends upon facts not exhibited by the pleading. The question presented is one of pleading. Whether, as matter of pleading or proof, facts might be shown rendering service upon the "deputy insurance commissioner," if it should be made to appear that there is such an officer, equivalent to service upon the commissioner, as specified in the section of statute pleaded, is not decided in this case.

Inasmuch as the second paragraph of complaint sets out specifically the manner in which jurisdiction of appellant's person was attempted to be acquired by the Pennsylvania court, and shows such attempt to have been futile, the demurrer to it should not have been overruled.

The judgment is reversed, with directions to sustain the demurrer to the second paragraph of complaint, and for further proceedings not inconsistent herewith.

Robinson, C. J., Henly and Black, JJ., concur. Comstock and Wiley, JJ., concur in result.

KING ET AL. v. MORRISTOWN FUEL & LIGHT
COMPANY ET AL.

[No. 4,490. Filed October 15, 1903.]

LANDLORD AND TENANT.—*Gas Lease.—Notice to Quit.*—Where the consideration for a lease consisted of a certain sum payable annually in advance and the use of gas in lessor's dwelling-house, the failure of lessee to pay the rent did not entitle the lessor to possession of the premises without notice while he continued the use of the gas. pp. 477-482.

APPEAL AND ERROR.—*Exception to Conclusions of Law.*—An exception to the conclusions of law admits the correctness of the facts found. p. 482.

From Shelby Circuit Court; *Douglas Morris*, Judge.

Action by Armstead King and wife against the Morristown Fuel & Light Company and another. From a

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judgment granting insufficient relief, plaintiffs appeal. *Affirmed.*

T. B. Adams and J. F. Walker, for appellants.

B. L. Smith, Claude Cambern, D. L. Smith, K. M. Hord and E. K. Adams, for appellees.

COMSTOCK, P. J.—This was an action by the appellants, Armstead King and Nancy King, his wife, against the appellees, the Morristown Fuel & Light Company and the Rushville Natural Gas Company, to recover possession of certain real estate, and damages for its detention. The court made a special finding that the appellants were not entitled to recover possession of the land, but that they were entitled to recover rent due therefor, in the sum of \$53.50 and costs, and judgment was rendered in their favor accordingly. The complaint was in three paragraphs. No question is raised as to the sufficiency of either.

Appellants assign as error the action of the court in overruling their demurrers to the second paragraph of answer and to the second paragraph of answer to the third paragraph of their complaint, respectively, and that the court erred in its first, second, and third conclusions of law, and each of them.

The third paragraph of the complaint was filed after appellee had answered the first and second paragraphs of the complaint. The following abstract of the complaint is from the appellants' brief: The first paragraph is for the possession of real estate described in the complaint, and in substance complains of the defendants, and says that they were wrongfully and unlawfully in possession of said real estate and gas-well thereon situated, and that they were wrongfully and unlawfully using the plaintiffs' gas, and claiming damages from the defendants for such unlawful detention of said real estate and gas-well and for the value of the gas taken from the said well after they wrongfully continued in the possession of the same. The

second paragraph is the same in substance as the first. The third was substantially the same as the first, except that it averred that under a contract with the Morristown Fuel & Light Company on the 1st day of September, 1898, the plaintiffs leased one-fourth of an acre in the northeast corner of a thirty-four acre tract of land, described in said complaint, and gave the defendants \$77 for drilling a gas-well on said one-fourth acre tract of land; that the defendant the Morristown Fuel & Light Company, in case it found gas in paying quantities, was to furnish gas at appellants' residence for the plaintiffs to have fuel and light; that said well was drilled by said defendants, and said plaintiffs supplied with gas which plaintiffs should be entitled to so long as said well yielded gas; that the plaintiff ever since the digging of said well has been enjoying said gas according to the terms of the contract. The defendants demurred to the sufficiency of these paragraphs of complaint, which demurrers were overruled by the court. The several paragraphs of the complaint describe the land leased in five different tracts, one consisting of thirty-four acres, and one of four acres. Substantially said affirmative paragraphs of answer alleged that on the 9th day of January, 1899, the plaintiffs executed a lease to the defendant the Morristown Fuel & Light Company of the real estate described in the complaint, a copy of which lease was filed therewith, and which lease is the same lease mentioned in the complaint. By the terms of the said lease said lessee was given the exclusive right to drill and operate for oil or gas on the lands described in the complaint, and the right to lay pipes on, along, and across, said lands and to remove pipes, tools, machinery, and fixtures, therefrom at the discretion of the lessee, which lease should continue in force, for the benefit of the lessee or its assigns, as long as gas or oil should be found in sufficient quantity to market and pipe away, at the discretion of said lessee; that in consider-

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ation of said grant it was provided that the lessors were to have gas for domestic purposes in their dwelling-house, and two fires and two lights in the tenant house on said premises, which gas was to be taken from the pipe-lines of the lessee, and \$25 per year for the location of a well on the four-acre tract in section four, commencing November 1, 1899, and payable yearly in advance, whether a well was drilled on said four-acre tract or not, and \$25 per year for each well drilled on said land thereafter; that after the execution of said lease, said Morristown Fuel & Light Company entered on said four-acre tract of plaintiffs, and drilled a well from which gas flowed in paying quantities, and immediately thereafter the plaintiff began the use of said gas in their dwelling and tenant house, as provided in said lease, and continued so to use the same continuously up to this time, and are still in full use and enjoyment of said gas, which is of the value of \$100 per year; that on the 11th day of September, 1899, said Morristown Fuel & Light Company sold and assigned said lease to the defendant the Rushville Natural Gas Company, which is now the owner of the same, and that within a few days after the 1st day of November, 1899, when said \$25 became due as aforesaid, said Rushville Natural Gas Company sent its check to plaintiffs in payment of the same, which check plaintiffs refused to accept, and on the 28th day of December, 1899, said company tendered said sum of \$25 to the plaintiffs in gold, which tender the plaintiffs refused to accept, and the defendant now brings into court with this answer, for the use of the plaintiffs, said \$25 in gold. The defendants further say that the only well located or drilled on plaintiffs' land is the one on the four-acre tract aforesaid, and that no demand for the payment of said \$25 was ever made on defendants, or either of them, prior to the bringing of this suit.

Appellants base their argument against the sufficiency of the answer upon the fact, which appears therein, that ap-

pellee failed to pay the \$25 rent provided for in the lease, in advance, upon the 1st day of November of each year; that the appellees by this failure forfeited their right under the lease, and appellants became entitled to possession. They base this claim upon §7094 Burns 1901, §5213 Horner 1901, which provides that where, by the express terms of a contract, rent is to be paid in advance, and the tenant has entered and refuses or neglects to pay the rent, no notice to quit is necessary. They cite *McNutt v. Grange Hall Assn.*, 2 Ind. App. 341; *Thomas v. Walmer*, 18 Ind. App. 112. Whether appellants' position is well taken must depend upon the consideration specified in the lease. If the \$25 named is the sole consideration, then the failure to pay the same according to the terms of the contract would entitle the appellants to possession. But the lease, which is made a part of the answer, but is not made a part of the complaint, makes the consideration for the rights therein given the right to use gas for specific purposes, to be taken from the pipe-lines of appellee, and the \$25 in money. The answer avers that appellants have, ever since the execution of the lease, continuously used said gas, and that it is of the value of \$100 per year. Appellants insist that as the complaint shows that the only well drilled was upon the sixty-six acre tract, and which did not include the four acre tract, and that they were to have the use of gas flowing therefrom for heating and illuminating purposes in their dwelling-house located on said land, and that they had paid the appellees \$77 for drilling the same, the gas from said well, before the lease of 1899 was entered into, belonged to them, and that the \$25 applied solely to the four-acre tract.

The lease in question provides for the use of gas in the dwelling-house, for drilling further wells, and for the payment of rent whether other wells are drilled or not. It embraces the terms of the first agreement mentioned in the complaint, and contains others in addition. The answer alleges

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that in the contract set out in the exhibit the contract entered into in 1898 was merged. We are of the opinion that this interpretation may reasonably be put upon it, and that the consideration of the new contract consisted of the \$25 of money, and the use of the gas therein provided for, as an entirety. While the appellants continue in the use of the gas under the lease—a part of the consideration—they ought not to be permitted to recover possession of the leased premises.

The conclusions of law, to each of which exceptions were taken, are as follows: (1) The defendant the Rushville Natural Gas Company has not forfeited any right under said lease of January 9, 1899 by reason of its failure to pay said sum of \$25 on November 1, 1899, when it became due and payable; (2) the plaintiffs are entitled to a judgment against defendant the Rushville Natural Gas Company in the sum of \$53.50, and to no other relief; (3) the plaintiffs are entitled to a judgment against defendants for their cost in this action laid out and expended.

The special finding of facts upon which the foregoing conclusions of law are based is substantially as follows: Appellants own the land described in the complaint, on which they reside; that they have resided on said land in a residence; that the said residence is located on the portion which is known by them as the sixty-six-acre tract, and is not on said four-acre tract; that there is and has been since November 1, 1898, a residence for tenant on the four-acre tract; that previous to November, 1898, the Morristown Fuel & Light Company was engaged in drilling for gas, and conveying it in pipes, and selling gas to its consumers; that in the month of November, 1898, the plaintiffs and said Morristown company entered into a written contract, by the terms of which said company agreed to drill a gas-well on plaintiffs' land aforesaid, and furnish

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plaintiffs gas for fuel and light in the house in which they resided, so long as gas was produced from said well, and said plaintiffs therein agreed to pay said company \$77; that in pursuance of said agreement, in November, 1898, said company drilled a gas-well on that portion of said land known as the sixty-six-acre tract, which did not embrace nor include said four-acre tract; that appellees drilled a gas-well on this land; that no well on the four-acre tract has been drilled, and no gas supplied to or demanded for the tenant house; that appellants piped their residence, and used gas from this well from November 1, 1898, down to the present time; that the gas so used was of the value of \$72 per year; that said well still continues to produce gas in paying quantities, and appellees have been continually selling gas from this well to the present time; that the value of gas from said well is of the value of \$230 per annum; that appellees have not paid appellants any money since said well was drilled, but on December 28, 1899, appellees tendered appellants \$25, which was refused, and on December 5, 1900, they tendered appellants \$50, which they refused to accept; that on December 28, 1899, there was due appellants, under said lease, \$25.23, as principal and interest, and on December 5, 1900, there was due appellants \$51.79, as principal and interest.

An exception to the conclusions of law admits the correctness of the facts found. Upon these findings the court did not err in its conclusions of law.

Judgment affirmed.

McGreggor v. State, *ex rel.*

MCGREGGOR ET AL. v. STATE, EX REL. BALLARD.

[No. 4,583. Filed October 15, 1903.]

SCHOOLS.—Teacher Without License.—Payment.—Injunction.—Neither §5903 nor §5911 Burns 1901, authorizes a suit by the State on the relation of the county superintendent of schools to enjoin a township trustee from paying a school teacher out of the school revenue for services rendered in teaching school, on the ground that the teacher was without license.

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Suit by the State, on the relation of John T. Ballard, against James H. McGregor and others. From a judgment for plaintiff, defendants appeal. *Reversed.*

L. C. Embree and *Luther Benson*, for appellants.

W. W. Medcalf, for appellee.

ROBY, J.—This action was brought in the name of the State of Indiana, on the relation of John T. Ballard, superintendent of public schools of Gibson county, against George W. Smith, trustee of Montgomery school township, and James H. McGregor, a teacher employed by said trustee.

It is averred that said trustee is threatening to pay out of the school revenue, and that McGregor is threatening to collect pay for his services in teaching a certain school in said township. The teacher is averred to have been without any license to teach in the public schools. To the complaint, McGregor's demurrer was overruled, answer was filed, trial had, and a special finding of facts made, conclusions of law stated, and judgment enjoining the trustee from paying to McGregor any money out of the school fund of Montgomery township for services as teacher for the term beginning September 24, 1900.

The power of the superintendent to maintain the proceeding in the name of the State upon his own relation is

challenged by the demurrer, and denied in the argument. There is no attempt to set up any private interest as a taxpayer or citizen, and the first question to be determined is as stated. In appellee's behalf, attention is called to two sections of the statute, under either of which, it is claimed, the action is well brought. In fixing the general duties of the officer, the following language is used, in connection with other provisions: "That the county superintendent shall have the general superintendence of the schools of his county." §5903 Burns 1901. The school, for teaching which the trustee is alleged to be threatening to pay, was concluded before this suit was brought. To superintend, as the word is here used, means to have charge and direction, to regulate the conduct and progress of. The school being no longer in existence, it is not possible to give it further superintendence. The action has for its primary purpose, not the supervision of the school, but the protection of the finances of the township. The character of supervision, thus directed in general terms, is indicated by the following clauses of the statute, from which it appears that visitation of the schools while in progress, attendance at and conduct of teachers' institutes, and generally the elevation of the standard of teaching, were contemplated. The statute does not, either expressly or by implication, confer the right to institute injunction proceedings against trustees.

The further provision relied upon has to do with the school fund, and is as follows: "The official dockets, records and books of account of the clerks of the courts, county auditor, county commissioners, justices of the peace, prosecuting attorneys, mayors of cities, and township and school trustees, shall be open at all times to the inspection of the county superintendent; and whenever he shall find that any of said officers have neglected or refuse to collect and pay over interest, fines, forfeitures, licenses or other claims due the school funds and revenues of the State, or have misapplied the school funds or revenues in their possession, he

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shall be required to institute suit in the name of the State of Indiana for the recovery of the same, for the benefit of the school funds or revenues and make report of the same to the board of county commissioners and to the state superintendent." §5911 Burns 1901. The superintendent may sue on his own relation under this section for the recovery of moneys misapplied by a school trustee. *Carr v. State, ex rel.*, 81 Ind. 342; *Nichols v. State, ex rel.*, 65 Ind. 512. It does not give or purport to give him any general power over the school fund. It does not make it his duty to protect the fund. His connection therewith is limited to the recovery named.

The complaint does not contain any allegations tending to show that the remedy at law is not adequate. It is not necessary to the discharge of the duty imposed upon the superintendent by this statute that power on his part to bring injunction proceedings be implied. No other warrant for the action than the sections cited has been claimed, and none is known. The court therefore erred in overruling the demurrer to the complaint.

Judgment reversed, with instructions to sustain such demurrer, and for further consistent proceedings.

GISH v. BOARD OF COMMISSIONERS OF ST.
JOSEPH COUNTY.

[No. 4,500. Filed October 15, 1903.]

COUNTIES. — *Physician for Poor Person. — Payment. — Appropriation by County Council.*—A complaint against a county by a physician for services rendered a poor person is insufficient, where it is not alleged that the county council had made an appropriation for the payment of such claim or class of claims.

From St. Joseph Circuit Court; *W. A. Funk*, Judge.

Action by John L. Gish against the Board of Commissioners of St. Joseph county. From a judgment for defendant, plaintiff appeals. *Affirmed.*

J. G. Orr, for appellant.

D. D. Bates, for appellee.

HENLEY, J.—The trial court in this case held the appellant's complaint insufficient, and out of this action arises the only question presented by the appeal. It is averred in his amended complaint that on the 10th day of December, 1900, appellant was a licensed physician and surgeon of St. Joseph county, Indiana; that at said date and for some years prior thereto he was a specialist in diseases of the eye, and was skilled in the treatment of such diseases; that on said 10th day of December, 1900, one Georgia Brown was a poor person living in Portage township, in St. Joseph county; that she was afflicted with a certain disease of the eye called "trachoma," and was nearly blind; that in order to save her eyesight, certain operations and special treatment were necessary; that prior to the 10th of December, 1900, a physician was employed by the board of commissioners as a physician for the poor of Portage township, and that he was in the employ of such board on the 10th of December, 1900; that said physician was not a specialist in diseases of the eye, and was incompetent to render the needed services to Georgia Brown; that on said 10th day of December the trustee of Portage township sent said Georgia Brown to the said physician employed by the board, for treatment for her disease, and that said physician failed and refused to render her any treatment, giving as his reason that he was not a specialist, and did not possess the necessary instruments and medicines required in treatment of diseases of the eye, and that said township physician told the trustee that said Georgia Brown should be taken to an eye specialist for treatment; that thereupon the trustee took her to the appellant, and employed appellant to treat her for the disease; that the appellant treated her from the 10th of December, 1900, up to and including the 10th day of

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May, 1901; that during that time he rendered her professional services of the value of \$227, as shown by the bill of particulars attached to the amended complaint, and that the services were worth \$227; that on the 7th day of October, 1901, appellant presented the claim for the services rendered to the board of commissioners of St. Joseph county, and that said claim was refused and wholly disallowed. The bill of particulars, showing the items and dates of treatment, is attached to this amended complaint. Appellant asks judgment against the board of commissioners of St. Joseph county for \$227.

The complaint is insufficient because it does not aver that the county council of St. Joseph county had appropriated a sum for the payment of this claim, or had appropriated a sum of money for the payment of a class of claims under which the claim in suit would fall. Nor does the claim fall within the class of claims which may be paid out of the county treasury without first having an appropriation made therefor. See §§5594b1, 5594e1-5594m1 Burns 1901; *Turner v. Board, etc.*, 158 Ind. 166. Under the facts alleged in the complaint appellee could not allow the claim; neither could the circuit court of St. Joseph county pronounce a valid judgment in appellant's favor against the county. Acts 1899, p. 343, §27; *Turner v. Board, etc., supra*.

By §8166g Burns 1901 the provisions of the poor law of 1901 are expressly controlled by what is commonly known as the county reform law of 1899. The section of the poor law above referred to is as follows: "Wherever there shall be organized a county council in any county in this State, it is hereby declared that the authority conferred by this act to pay officers and employes of such asylums and to pay for materials and supplies of every sort therefor, shall be, and the same is hereby strictly limited to the extent of specific appropriations of money made in advance by such county council upon estimates furnished.

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No obligation or liability of any sort shall be incurred by any officer on behalf of said county unless the same shall fall within the appropriation specifically made for the purpose. Any undertakings or agreements contrary to the provisions of this section are declared to be absolutely void, and no action shall be maintained against the county thereon."

It seems to us that the statutes in force are directly applicable here, and that the facts averred in the complaint do not state a cause of action.

The judgment is affirmed.

SOUTH CHICAGO CITY RAILWAY COMPANY v.
ZERLER.

[No. 3,544. Filed December 10, 1902. Rehearing denied March 20, 1903. Transfer denied October 15, 1903.]

NEGLIGENCE.—Complaint.—A complaint for personal injuries will not be held insufficient because the act of negligence was charged in general terms, where no motion was made to make more specific. *pp. 489, 490.*

APPEAL AND ERROR.—Evidence.—Instructions.—Bill of Exceptions.—The original manuscript of the evidence and the instructions can not be brought up by one bill of exceptions. *pp. 490-492.*

SAME.—Instructions.—Where Evidence Not in Record.—In the absence of the evidence, a cause will not be reversed because of the alleged error of court in giving certain instructions and in refusing to give certain instructions, where the instructions given were correct as mere abstract propositions of law; since the court can not say, in the absence of the evidence, that the instructions given were not applicable to the case or that those refused were applicable. *p. 493.*

From Laporte Superior Court; *H. B. Tuthill*, Judge.

Action by Charles Zerler, Sr., against the South Chicago City Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Peter Crumpacker and *J. D. Moran*, for appellant.

A. F. Knotts and *J. F. Gallaher*, for appellee.

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ROBINSON, J.—The complaint avers that appellee's wife was a passenger on one of appellant's cars and desired to alight at a regular stopping place, which fact was known to appellant's servants in charge of the car: "that just as said Wilhelmina Zerler, plaintiff's wife, was attempting to alight, and before she was enabled to do so the said defendant, by and through its agents and officials and employes, without any fault or carelessness on the part of the plaintiff or his said wife, carelessly and negligently started said car with a quick and rapid jerk and movement of said car; that said Wilhelmina Zerler, this plaintiff's wife, was then and there, without any fault or carelessness or negligence on her part or on the part of the plaintiff, and through the carelessness and negligence and fault of the defendant, its agents and employes, in and by reason of said careless and negligent starting, with a quick and sudden jerk its said car, then and there throw the said Wilhelmina Zerler, plaintiff's wife, from its said car violently to the ground and street, and then and there carelessly and negligently, and without any fault or carelessness or negligence on the part of the plaintiff or on the part of his said wife, Wilhelmina Zerler, throw, thrust, and propelled the said Wilhelmina Zerler, plaintiff's wife, from its said car and to the ground as aforesaid, and then and there carelessly and negligently, and without any fault or carelessness or negligence on the part of the plaintiff or his said wife," injured her.

Appellant has assigned as errors, overruling the demurrer to the complaint, and overruling the motion for a new trial.

It is quite true that the facts stated in a complaint must be stated with certainty, and in an action for negligence the negligent act must be stated in such terms as show it to have been the efficient cause of the injury complained of. While the selection of the terms used in the complaint might be open to some objection, yet, applying the

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general rule that a pleading must be taken as a whole, and construed according to its general scope and tenor, we think it sufficiently appears that the appellant is charged with having carelessly and negligently started its car with a sudden jerk while the passenger was alighting from the car, which threw her to the ground and injured her. The charge is made in general terms, but, if so desired to have the charge made more specific, a motion to that effect should have been made. *Louisville, etc., R. Co. v. Jones*, 108 Ind. 551; *Byard v. Harkrider*, 108 Ind. 376; *Pittsburgh, etc., R. Co. v. Kitley*, 118 Ind. 152.

It is also argued that error was committed by the trial court in re-reading to the jury a portion of the instructions, but, as this action of the court has not been brought up by any bill of exceptions, no question is presented.

The remaining questions argued are not presented, if, as insisted by counsel for appellee, the evidence is not in the record. Appellant's motion for a new trial was overruled December 7, 1899, and ninety days' time given appellant to file its bill of exceptions. On May 7, 1900, the following entry appears: "Now comes the defendant, by counsel, and files its bill of exceptions herein, in these words." Then follows what purports to be a longhand manuscript of the evidence, and a certificate of the reporter. Following this is the clerk's certificate, without any seal, that "the above longhand transcript" of the evidence was filed in his office prior to the presentation of the bill of exceptions to the judge on February 13, 1900. Immediately following is this recital: "And thereupon, after all the evidence had been given and introduced by the respective parties in said cause, the defendant tendered to the court its written instructions numbered one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, and thirteen, and asked the court to give the same, and each separate instruction thereof, at the proper time to the jury, but the court refused to give said instructions, or any of

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them, to which refusal as to each and every of said written instructions the defendant separately and severally at the time excepted, and said instructions so refused were thereupon filed in the cause, and are as follows, to wit." These instructions, with exceptions to the refusal to give them, are set out; also two instructions requested which were modified and given. Following these are the instructions given by the court, and exceptions. Then follows this certificate, signed by the judge: "And now upon this 13th day of February, 1900, comes the defendant herein, and presents this, its bill of exceptions, and prays that the same may be signed, sealed, and made a part of the record in the above entitled cause; but the court not having sufficient time to examine said bill of exceptions, now takes the same under advisement." This is followed by: "And again, upon this, the 5th day of April, 1900, comes the defendant in the above-entitled cause, and presents this, its bill of exceptions in said cause; and the court, having examined the same, now signs, seals, and makes said bill of exceptions a part of the record herein, and hereby certifies that the above and foregoing transcript of the evidence in said cause is correct, and contains all of the evidence given upon the trial of said cause. Given under my hand and seal this 5th day of April, 1900." These two certificates appear to have been copied into the transcript. The certificate of the clerk follows, in which he certifies "that the above and foregoing transcript contains full, true, and complete copies of all the papers and order-book entries and the judgment in said cause, as the same appears of record and on file in my office. I further certify that on the 13th day of February, 1900, Ernest L. Shortridge, the official shorthand reporter who took down the evidence in said cause, filed in my office his longhand transcript thereof, which is the same transcript of the evidence incorporated in the bill of exceptions and made part of the foregoing transcript, and that said bill of exceptions was

signed by the Hon. Harry B. Tuthill, judge of said court, on the 5th day of April, 1900, and verified in my office on the 7th day of May, 1900. In witness whereof," etc.

It is apparent from the record that the bill of exceptions in the transcript is a copy of the whole original bill of exceptions, except the manuscript of the evidence is the original manuscript. It seems that the evidence and the instructions were all put into one original bill of exceptions; that the manuscript of the evidence was taken from this bill and inserted in the transcript, the instructions and all the rest of the original bill being copied. This is so stated in appellant's brief. The clerk's certificate shows that the manuscript of the evidence in the transcript is the original manuscript, and not a copy. To bring instructions into the record by a bill of exceptions, the whole original bill containing the instructions must be copied into the transcript. But to bring the original longhand manuscript of the evidence into the record without copying the evidence, the whole original bill of exceptions embracing the evidence must be put into the transcript. The judge's original certificate is as much a part of such an original bill of exceptions as is the original manuscript of the evidence. It must necessarily follow that the original manuscript of the evidence and the instructions can not be brought up by one bill of exceptions. *Leach v. Mat-
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Judgment affirmed.

**HOME ELECTRIC LIGHT & POWER COMPANY ET
AL. v. COLLINS.**

[No. 3,624. Filed March 17, 1903. Rehearing denied May 26, 1903.
Transfer denied October 15, 1903.]

APPEAL.—Joint Exceptions.—Review.—An exception taken by two or more coparties jointly to a ruling is a formal notice of their purpose jointly to reserve the question and assign it as error on appeal, and unless the action of the court excepted to jointly can be reviewed as to all who join in the exception, it may not be reviewed as to any of them. pp. 494, 495.

CONTRACTS.—Rescission for Failure to Comply with Provisions.—Recovery of Part of Consideration Paid.—C entered into an agreement with

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three stockholders of a corporation by the terms of which he was to purchase their certain shares of stock, \$2,000 to be paid at the time the agreement was entered into, and a second payment at a fixed time in the future. The stock was not to be assigned to C until the second payment was made. The contract was signed by the three stockholders and the corporation. The cash payment was made to the three stockholders. Upon default in making second payment, C was notified by the three stockholders and the corporation that they had determined to rescind any rights of plaintiff under the contract because of his failure to comply with its provisions. *Held*, that there could be no recovery by C against the corporation on account of the \$2,000 payment. *pp.* 496, 497.

CORPORATIONS.—*Fraud of Stockholder in Sale of His Stock.*—Where corporate stock is purchased of stockholders who individually misrepresent the condition of the corporation for their own benefit, the corporation is not liable in damages for such fraudulent misrepresentations, although the agreement as to the terms of sale be signed by the corporation. *p.* 498.

From Elkhart Circuit Court; *Anthony Deahl*, Special Judge.

Action by Carroll Collins against the Home Electric Light & Power Company and others. From a judgment for plaintiff, defendants appeal. *Reversed.*

J. S. Dodge and *O. Z. Hubbell*, for appellants.

O. T. Chamberlain and *P. L. Turner*, for appellee.

BLACK, P. J.—The appellee sued the appellants, the Home Electric Light & Power Company, Orrin N. Lumbert, John E. Micks and Ephraim L. Gilman. The judgment was in favor of the appellee against the corporation alone. We therefore can examine only the alleged errors assigned by the corporation separately; being the overruling of its separate demurrer to each of the six paragraphs of complaint, and the overruling of its motion for a new trial.

The demurrer to the complaint was a several and separate demurrer of each of the defendants to each of the paragraphs of complaint. Upon the overruling of the demurrer the defendants jointly excepted. "Where the objection or exception in the court below or assignment of

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error in this court is joint as to several rulings or acts of the court, the same will fail unless valid as to all such rulings or acts." *Saunders v. Montgomery*, 143 Ind. 185. An assignment by two or more of a ruling against one only, as error, can not be sustained as to anyone, because it is not well assigned by all who join therein. *Walker v. Hill*, 111 Ind. 223; *Sparklin v. Wardens, etc.*, 119 Ind. 535; *King v. Easton*, 135 Ind. 353; *Goss v. Wallace*, 140 Ind. 541. Errors must be joint against all who join in assigning them on appeal, to be available. *Green v. Heaston*, 154 Ind. 127; *Grimes v. Grimes*, 141 Ind. 480. Upon a joint assignment of errors, one of several appellants can not avail himself of errors which are not common to all his co-appellants, but affect him alone. *Yeoman v. Shaef-fer*, 155 Ind. 308. Where appellants jointly assigned as errors a ruling on the separate demurrer of each of them, and the separate motion of each for a new trial, it was held that no question was presented. *Louisville, etc., R. Co. v. Smoot*, 135 Ind. 220. An exception taken jointly by a number of coparties can not avail them, unless well taken as to all of them. *Hatfield v. Cummings*, 152 Ind. 537. "Where two or more parties unite in an exception, it must be well taken as to all or it will be unavailing." Elliott, App. Proc., §788. An exception taken by two or more coparties jointly to a ruling is a formal notice of their purpose jointly to reserve the question upon that ruling for future review, and to assign it as error on an appeal from the judgment in the cause. Unless the action of the court excepted to jointly can be reviewed as to all who joined in the exception, it ought not to be reviewed as to any of them.

The suggestion of the appellee that no question is properly presented as to the sufficiency of the complaint seems to be correct. The motion for a new trial was made by the appellants severally, and they severally excepted to the overruling thereof. A very large number of causes

were assigned in the motion, many of them not so presented in the record as to make the errors, if such, to which they related, available for the corporation alone.

The record, however, requires us to examine as to the assignments that the verdict was not sustained by sufficient evidence, that it was contrary to law, and that the amount of recovery—\$2,335—was too large. The capital stock of the corporation amounted, at its face value, to \$50,000, and the defendants Lumbert, Micks, and Gilman, each separately owned a number of shares; the aggregate amount of the stock owned by them being seven-eighths of the whole capital stock. In August, 1896, a contract in writing was made for the sale of the stock of these three stockholders to the appellee Collins. It was signed by these four persons, and with their names was also signed the name of the corporation, by the defendant Lumbert, as vice-president, and the defendant Micks, as secretary. The contract, however, was an executory agreement, the expressed purpose of which was the purchase by the appellee, and the sale to him by the three individual defendants, of the stock of the defendant Micks, of the par value of \$12,500, the stock of the defendant Gilman, of the same amount, and the stock of the defendant Lumbert, of the par value of \$18,750. Among the provisions for the payment for these shares of stock was one for the payment by the appellee of \$2,000 in cash, upon the making of the contract, to the defendants Micks, Lumbert, and Gilman, who, according to the terms of the contract, were to be paid, in a manner stated in the contract, a further sum in December, 1896; and until the payment of the \$2,000 payable immediately, and of the amount payable in December, the appellee was not to be entitled to any of the proceeds from the running of the plant of the corporation, or to the control of such proceeds or of the plant, nor was the stock to be sooner assigned to the appellee. After the date in December for the payment of the sum

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then to be received, the same not being paid, a notice in writing, signed by the three individual defendants, and by the corporation, by Micks, secretary, and addressed to the appellee, was delivered to him, which purported to be a notice from the signers thereof that they had determined to elect to rescind any rights or privileges of the appellee by reason of the contract, because of his failure to comply with its provisions. In the amount of recovery was included, it seems to be conceded, a sum because of the \$2,000 in cash paid by the appellee at the making of the contract. We can not find any reason for a recovery against the corporation on account of this payment. By the terms of the contract no part of this sum was to go to the corporation, but it was all to go to the three stockholders in part payment under the agreement for the purchase of their shares of stock; and the evidence shows, without conflict, that it all did go to them, and was distributed among them in the ratio of their holdings of stock, and was appropriated by them to their own use as individuals, as was the manifest intention of the appellee, as shown by the terms of the contract. It was not money paid to the corporation or received by any other person for its use and benefit. We have no occasion to express any opinion as to the liability of the three stockholders who received and retained the money, but we know no reason for requiring the corporation to repay it.

The appellee rendered service in the employment of the corporation for a number of months, for which he was paid in part only. There was a contention between the parties as to the rate of compensation per month to which he was entitled, but it appears from the evidence that some portion of the compensation, whether reckoned at the rate for which the appellee contended, or by that insisted upon by the defendants, remained unpaid; and some portion of the amount of recovery would seem to be attributable

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to this claim on account of services rendered, but we are unable to determine satisfactorily what amount was awarded on this account.

All of the paragraphs of complaint sought recovery either on account of such services, or the payment in cash at the making of the contract, except that in one paragraph recovery of damages was sought on the ground of deceit, through alleged fraudulent representations. If it were claimed that the verdict embraced any damages for fraud, the evidence shows that all the alleged fraudulent representations were made by the individual defendants for their own benefit, in an attempt on their part to sell their shares of stock; and, whatever might properly be said as to the liability of the individual defendants on this ground, the evidence would not warrant a recovery of such damages from the corporation.

Judgment reversed, and cause remanded for a new trial.

EVERETT PIANO COMPANY v. BASH.

[No. 4,504. Filed October 16, 1903.]

APPEAL AND ERROR.—Jurisdiction.—Dismissal.—The Appellate Court takes notice of its jurisdiction, and will dismiss an appeal, where it has no jurisdiction thereof, without a motion to dismiss. pp. 499, 500.

SAME.—Jurisdiction.—Amendatory Act.—The act of 1903 (Acts 1903, p. 280) amending §6 and §7 of the act of 1901 (Acts 1901, p. 565) concerning appeals applies only to appeals taken after the taking effect of the amendatory act. p. 500.

JUSTICES OF THE PEACE.—Jurisdiction.—The clause of §1500 Burns 1901 giving justices of the peace jurisdiction to the extent of \$100 is surplusage as to the amount stated, and, under this statute, justices of the peace have original jurisdiction in actions of contracts or tort, where the debt or damage claimed, or the value of the property sought to be recovered, does not exceed \$200, and have jurisdiction to enter judgment by confession to the amount of \$300. p. 500.

APPEAL AND ERROR.—Cause Within Jurisdiction of Justice of the Peace.—Complaint.—Demand.—In a suit for damages for a breach of a written warranty in the sale of a piano, certain defects in the

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construction of the piano were alleged in the complaint, for which certain expenses were incurred, and it was alleged, "that the said instrument, if equal to the guaranty, would be of the value of \$250, whereas it is, in fact, worth not to exceed \$125, demanding judgment for \$200 damages. The complaint was amended by changing the amount as to the value of the piano from \$250 to \$100, but the demand was not increased, and plaintiff recovered a judgment for \$200, from which an appeal was taken. *Held*, that the amendment did not affect the jurisdiction, as the amount of damages demanded was not changed, that the cause was within the jurisdiction of a justice of the peace, and an appeal thereof to the Supreme or Appellate Court was prohibited by the act of 1901 (Acts 1901, p. 565). pp. 500-504.

From Wabash Circuit Court; *W. G. Sayre*, Special Judge.

Action by Sherman F. Bash against the Everett Piano Company. From a judgment for plaintiff, defendant appeals. *Appeal dismissed.*

J. F. France and *Z. T. Dungan*, for appellant.

U. S. Lesh and *Eben Lesh*, for appellee.

BLACK, J.—The appellant was sued by the appellee for damages for a breach of a written warranty in the sale of a piano.

The appellee, appearing specially, has filed a motion for the dismissal of the appeal for want of jurisdiction. The appeal was taken in term time, the transcript on appeal being filed July 15, 1902. The act of March 12, 1901, concerning appeals, etc. (Acts 1901, p. 565 *et seq.*, §1337a *et seq.* Burns 1901), provided in §6: "No appeal shall hereafter be taken to the Supreme Court or to the Appellate Court in any civil case which is within the jurisdiction of a justice of the peace except as provided in §8 of this act." There is not in this case any question mentioned in §8 of that statute, and, therefore, if the cause is one within the jurisdiction of a justice of the peace, the appeal must be dismissed; and this would be true without a motion to dismiss, inasmuch as this court must take notice

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of its want of jurisdiction. *Fitch v. Long*, 29 Ind. App. 463. The act of 1903 (Acts 1903, p. 280), amending §6 and §7 of the above mentioned statute of 1901, relates by its terms only to appeals taken after the taking effect of the amendatory act, March 9, 1903. By §10 of an act of 1861 (Acts 1861, p. 140, §1500 Burns 1901) it is provided: "Justices of the peace shall have jurisdiction to try and determine suits founded on contracts or tort, where the debt or damage claimed or the value of the property sought to be recovered does not exceed \$100, and concurrent jurisdiction to the amount of \$200, but the defendant may confess judgment for any sum not exceeding \$300. No justice shall have jurisdiction in any action of slander, for malicious prosecutions, or breach of marriage contract, nor in any action wherein the title to lands shall come in question, or the justice be related by blood or marriage to either party." The clause of this statute giving jurisdiction to the extent of \$100 is surplusage as to the amount stated, and, under this statute, justices of the peace have original jurisdiction in actions of contract or tort, where the debt or damage claimed, or the value of the property sought to be recovered, does not exceed \$200, and have jurisdiction to enter judgment by confession to the amount of \$300. *Leathers v. Hogan*, 17 Ind. 242; *Chicago, etc., R. Co v. Spencer*, 23 Ind. App. 605; *Second Nat. Bank v. Hutton*, 81 Ind. 101; *Dugdale v. Doney*, 28 Ind. App. 283.

The written warranty declared upon, in the body thereof, was as follows: "This is to certify that the piano, style seventeen, E. B. No. 20,059, manufactured by the Everett Piano Company and sold by Wm. John & Son, of Huntington, Indiana, is warranted against any defect in manufacture, and seven years are allowed to test the same." It was alleged in the complaint, "that said piano is defective in the manufacture thereof, in this: that it will not remain in tune for a reasonable length of time, and

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that the plaintiff is required to employ a skilled workman to place the same in tune as often as four times annually. Plaintiff avers that said failure to remain in tune results from defects in the construction and manufacture thereof. Plaintiff avers that by reason of said defective construction and manufacture he has been required to expend the sum of \$65 in having the same placed in tune, and has by reason thereof been damaged in said sum of \$65; that he was once required to ship said piano to Cincinnati for repair, at an expense of \$10, by which he was damaged in the said sum of \$10; that the said instrument, if equal to the guaranty, would be of the value of \$400, whereas it is, in fact, worth not to exceed \$125. Plaintiff avers that the aforesaid defect in the construction and manufacture of said piano constitutes a breach of the said guaranty, by which breach he has been damaged in the sum of \$200, as above set out. Wherefore plaintiff prays judgment for \$200 damages, his costs, and all other proper relief."

It appears from an entry of record that the court granted the appellee leave to amend the complaint "by changing the amounts as to value of instrument from \$250 to \$400." Upon trial the court found for the appellee in the sum of \$200, and thereupon rendered judgment accordingly.

In *Washburn v. Payne*, 2 Blackf. 216, the action was brought before a justice of the peace on a bond for \$175, with condition for the delivery of certain property. The plaintiff, in stating his cause of action, claimed \$81.25, and he had judgment for that amount. The statute gave jurisdiction to a justice of the peace where the sum due or demanded did not exceed \$100. It was held that the cause was within the jurisdiction of the justice of the peace.

In *State Bank v. Brooks*, 4 Blackf. 485, it was held that the whole amount of the several sums demanded in the declaration, and not the amount of any particular item, should be considered in respect to the jurisdiction of the

signed by the Hon. Harry B. Tuthill, judge of said court, on the 5th day of April, 1900, and verified in my office on the 7th day of May, 1900. In witness whereof," etc.

It is apparent from the record that the bill of exceptions in the transcript is a copy of the whole original bill of exceptions, except the manuscript of the evidence is the original manuscript. It seems that the evidence and the instructions were all put into one original bill of exceptions; that the manuscript of the evidence was taken from this bill and inserted in the transcript, the instructions and all the rest of the original bill being copied. This is so stated in appellant's brief. The clerk's certificate shows that the manuscript of the evidence in the transcript is the original manuscript, and not a copy. To bring instructions into the record by a bill of exceptions, the whole original bill containing the instructions must be copied into the transcript. But to bring the original longhand manuscript of the evidence into the record without copying the evidence, the whole original bill of exceptions embracing the evidence must be put into the transcript. The judge's original certificate is as much a part of such an original bill of exceptions as is the original manuscript of the evidence. It must necessarily follow that the original manuscript of the evidence and the instructions can not be brought up by one bill of exceptions. *Leach v. Matix*, 149 Ind. 146. In the one case it is necessary to bring up the original certificate of the judge, which is an essential part of the original bill, and in the other it must be copied. The original manuscript of the evidence is not incorporated into a bill of exceptions until the judge has signed the bill, and caused it to be filed. It is this bill the clerk may certify to the appellate court, and not simply the longhand manuscript of the evidence. The statute (§638a Burns 1901) says it shall be sufficient if the transcript contain the original bill of exceptions, embracing all such evidence. "When it is thus incorporated into

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As everything in the bill of exceptions, except the evidence, seems to have been copied into the transcript, the bill is sufficient to bring the instructions into the record. But in the absence of the evidence we can not say that the court erred in giving or in refusing to give instructions. An examination of the instructions given does not disclose that any of them are erroneous, as mere abstract propositions of law, and without the evidence we can not say that they were not applicable to the case made by the evidence. And in the absence of the evidence we must conclude, although an instruction asked for stated the law correctly, that it was refused because it was not applicable to the case made by the evidence.

Judgment affirmed. .

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trators firmly by these presents. Sealed with his seal and dated this 26th day of May, 1892. The conditions of this obligation are such, whereas the above bounden obligor has subscribed for four shares of stock at \$100 each in said association, for which shares of stock he received from said association the sum of \$400 as a loan, which shares of stock are hereby transferred as collateral security for the payment of this bond, with agreement on his part that he will continue to pay monthly dues on said shares of stock at the rate of eighty cents per month on each share of stock, together with a premium of six per cent. per annum on each share of stock, and interest on said loan at the rate of six per cent. per annum, all payable on or before the 25th day of each month, until such shares shall mature as provided by the by-laws of said association; also, pay all fines and assessments on such shares as provided for in said by-laws. All payments of money hereunder shall be made at the offices of the association, in the city of Indianapolis, Indiana. Now, if the above bounden obligor shall well and truly keep and perform said bond in every part, then the above bounden obligation to be void and of no effect; but if default be made in any part thereof, then the above bounden obligor to forfeit all the premiums, fines, assessments, and interest so paid into said association, and pay back said loan less all such dues credited thereon. All payments of money hereby secured shall be made without relief from valuation or appraisement laws, and with ten per cent. attorney's fees. (Signed) George W. Noah."

Appellant Emma Stradley answered in six paragraphs, as follows: (1) Payment; (2) set-off in the amount paid by appellant as a borrowing stockholder, which, with the added earnings, amounted to \$642.80; (3) set-off in the amount of \$642.80, being seventy-two consecutive monthly payments of \$7.20 each, with the earnings thereof added—the earnings being alleged to be \$124.40; (4) that the

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stock certificate provides for only seventy-two monthly payments, and that such payments were made before the commencement of this action; (5) that appellee's agent, by printed circular used and oral representations made in negotiating the loan, represented that the seventy-two payments would mature the stock and pay the debt, and that appellee was thereby estopped; (6) that the value of the appellant's stock exceeds and more than pays the debt and interest; and that appellee had exceeded the powers and rights given it by the statute under which it was organized.

The trial court sustained appellee's demurrer to the second, third, and sixth paragraphs of answer. The trial resulted in a finding and judgment for appellee in the sum of \$248.60, and foreclosing the mortgage.

It is assigned as error that the trial court erred in striking out interrogatories forty-three to ninety-one, both inclusive, and interrogatories one hundred and three and one hundred and six. The error, if any, arising out of this action of the trial court in this regard is not presented by the assignment of error. The question must be presented by motion for a new trial. It does not appear as one of the specifications in appellants' motion for a new trial. It was not error to strike out the exhibits filed with appellants' fifth paragraph of answer. These exhibits consisted of printed statements of the condition of appellee company, of the plan or method of doing business, and of the profit coming to both borrowing and non-borrowing stockholders. The fifth paragraph of answer was held sufficient without these exhibits. Its allegations covered all the material facts stated in the exhibits, and upon the trial they were admitted in evidence thereunder. The foundation of the answer was not the exhibits, and, as evidence, they performed for appellants every legal service to which they were entitled. Nor did the trial court commit reversible error in sustaining appellee's demurrer to the second, third, and sixth paragraphs of answer. Any evidence admissible

under the second and third paragraphs was admissible under the other issues made, and the defense of *ultra vires* attempted in the sixth paragraph could not be made by appellant in his position as appellee's debtor. *Poock v. Lafayette Bldg. Assn.*, 71 Ind. 357; *Chicago, etc., R. Co. v. Derkes*, 103 Ind. 520; *National Bank v. Matthews*, 98 U. S. 621; *Thompson, Corporations*, §§6021-6040. The rule prohibiting a debtor from denying the right of the creditor to make the loan to him is well stated by Thompson in §6040, *supra*, as follows: "The doctrine now is, that the corporation thus making the loan in good faith may recover upon or enforce the security, and that the borrower will be estopped, by his act of receiving the loan and keeping the money, from setting up that the corporation had no power to make it."

The questions raised under appellants' motion for a new trial hardly admit of separate discussion. It is the well settled law in this State that where a certificate of stock of a building and loan association provides that the payments thereon shall not exceed a certain number specified therein, the stockholder can not be required to pay more than the specified number. The payment of the number of payments named in the certificate of stock may not mature it and make it worth its face value—which result the association does not guarantee—but the stock only matures when the dues paid and earnings apportioned to it amount to the face value thereof. *Wayne, etc., Assn. v. Skelton*, 27 Ind. App. 624; *Union Mut., etc., Assn. v. Aichele*, 28 Ind. App. 69. That when the stockholder becomes a borrowing member, and such agreement as to the number of payments to be made is not carried into the bond and mortgage securing the loan, but instead thereof it is provided in the bond and mortgage that the borrower shall continue to pay the dues on such stock until it matures according to the by-laws of such association, then in such case the limitation placed on the number of payments is of no avail to the borrowing

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member, because the contract as represented by his bond and mortgage is the contract by which he is bound, and its terms as to the repayment of the loan will be enforced. *Wayne, etc., Assn. v. Skelton, supra.* Oral or printed statements made by the officers or agents of a building and loan association in direct contradiction of the by-laws, when the by-laws are made a part of the contract by reference thereto, or when such declarations or statements are in direct contradiction of the plain language of the contract itself, whether relied upon by the person to whom made or not, can not be made the basis of an estoppel, unless such representations are fraudulently made. The case of *Hartman v. International Bldg., etc., Assn.*, 28 Ind. App. 65, does not hold otherwise, and its reasoning is in line with this statement of the law.

The case at bar is not within the reasoning or rule announced in *Lime City, etc., Assn. v. Wagner*, 122 Ind. 78, 17 Am. St. 342, and *International Bldg., etc., Assn. v. Bratton*, 24 Ind. App. 654. Both the bond and mortgage required appellant to pay the dues until the stock matured. This she had not done. The trial court properly permitted the secretary of the appellee association to testify as to the value of appellants' stock at the time of the trial, and we think rendered a correct judgment from the evidence presented by the record.

Judgment affirmed.

KEPLER v. WRIGHT.

[No. 4,797. Filed October 27, 1903.]

SPECIFIC PERFORMANCE. — *Contract to Convey Land. — Complaint.* —

Where, by the terms of a contract for the sale and conveyance of real estate, the payment of \$100 and the execution of a note and mortgage for the remainder of the purchase money was to precede the execution of the deed, but after the payment of a sum far in excess of \$100 the vendor repudiated the contract, a complaint by the vendee for specific performance is not bad for want of an averment that plaintiff had made or offered to make the note and mortgage. *p. 514.*

SAME. — *Contract to Convey Land. — Special Findings. — Conclusion of Law.*

—A contract for the sale and conveyance of land provided that the vendee should take possession of the real estate and make specified monthly payments until \$100 of the purchase price had been paid, at which time the vendee was to execute a note and mortgage for the remainder of the purchase money and the vendor to execute a deed of conveyance. In a suit by vendee for specific performance, the court found specially that the vendee took possession of the land and made the payments as provided, and, when \$100 had been paid, demanded of vendor that he execute a deed, which was refused; that the vendee continued to make payments, until a sum far in excess of \$100 had been paid, when the vendor took forcible possession of the premises and has held possession ever since; that the total amount paid by the vendee, including the rental value of the premises after the vendee was dispossessed was equal to the full purchase price as stipulated in the agreement. It was further found that after the payment of the first \$100 by the vendee, the vendor voluntarily paid taxes on the property, a part of which had become delinquent. *Held*, that the findings justified the conclusion of law that plaintiff was entitled to a deed and to possession, and that the right to have his contract specifically enforced dated from the time he first demanded a deed. *pp. 514-516.*

TRIAL. — *Conclusions of Law. — Motion to Modify Judgment.* — When a judgment conforms to the conclusions of law, a motion to modify the judgment can not prevail. *p. 516.*

From Wayne Circuit Court; *H. C. Fox*, Judge.

Suit by Amanda Wright against George T. Kepler. From a judgment for plaintiff, defendant appeals. *Affirmed.*

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L. E. Kepler, for appellant.

W. A. Medsker, W. F. Medsker and W. A. Bond, for appellee.

ROBINSON, C. J.—Transferred from the Supreme Court under the act of March 12, 1901. Suit for the specific performance of a contract to sell land. In appellee's complaint it is averred that in January, 1888, appellant owned a certain lot, which appellee, by a written contract, purchased, and which appellant agreed to convey to appellee. The contract, made a part of the complaint, provides that appellant "hereby leases and lets unto" appellee the lot described "at the monthly rent of the repairs and \$3 cash rent, payable monthly on the 14th day of each month." Appellant "further agrees to make to the order of Amanda Wright a warranty deed for said property when she pays \$100 on the property and gives a note and mortgage for \$130 at eight per cent. in advance, considering the property worth \$230, and the \$3 or other sums paid every month, payments on the \$230 to be calculated as if the \$230 were to draw eight per cent. interest payable monthly in advance from date." It was also agreed that appellee should have no right to hold possession unless she kept the property in good repair and paid the rent in advance, and, if she failed to pay the \$3 per month, appellant should have the right to enter and take possession only after giving thirty days' written notice, unless the rent was paid before the expiration of the thirty days. It is further averred that appellee took possession under the contract, and made lasting and valuable improvements; that she paid the \$100 according to the terms of the contract; that she had paid him a sum far in excess of that amount, and has performed all the covenants incumbent upon her under the contract; that she has repeatedly demanded that appellant execute to her a warranty deed to the lot, which he has refused to do; that in December, 1900, appellant, during the tem-

porary absence of appellee, unlawfully entered into and took possession of the premises without right or process of law, and now holds the same from appellee; that she has long since paid to appellant all the money due him by the agreement, and that if any sum still remains unpaid she is willing to pay the same, and brings the same into court for appellant's use and benefit; asking that the deed be executed, and for damages.

The complaint is not as specific in some particulars as it should be, but, as it does not wholly omit any material averment, such defects may be, and in this case are, cured by the special finding of facts.

The complaint is not defective for want of an averment that appellee made or offered to make the note and mortgage. The execution of the deed and the execution of the note and mortgage were concurrent acts. But, when the agreed amount was paid, the next act to be done was the making of the deed. When appellant refused to make the deed, he repudiated the contract so far as he could. After he had refused to make the deed, it would have been a useless formality to tender the note and mortgage. In *Parker v. McAllister*, 14 Ind. 12—a similar case—the court said: "By the terms of the contract, the payment of the first instalment was to precede the execution of the deed by the vendor. The making of the deed was the next thing in order; for regularly no mortgage could be made by the vendee until the vendor had passed the title to him. As the vendor refused to accept the money, and, so far as he could, repudiated the contract, the tender of a mortgage could not be made; for the vendee had no legal title to the land to mortgage." See *Souffrain v. McDonald*, 27 Ind. 269; *Turner v. Parry*, 27 Ind. 163; *Blair v. Hamilton*, 48 Ind. 32; *Burns v. Fox*, 113 Ind. 205; *Horner v. Clark*, 27 Ind. App. 6.

The special findings show the execution of the written contract; that immediately after the execution of the con-

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tract appellee took possession of the lot, and continued to occupy the same until about December 21, 1900, at which time, during the absence of appellee, and without her knowledge and consent, appellant took forcible possession of the premises, and has continued to hold such possession, without right, until the present time; that after appellee took possession she paid appellant \$3 each and every month for eighty-nine consecutive months, beginning with the month of January, 1888, and ending with the month of May, 1895; during such time she kept the property in repair, as she had agreed; during the years 1895 and 1896 appellee's husband furnished appellant, at his request, butter, meat, and eggs, to the amount of \$22.85, which sum it was agreed should be applied to the purchase price of the property; that she has paid in all upon the purchase price of the property \$289.80; that at the time appellant forcibly took possession the rental value of the property was \$3 per month, of which appellee has been deprived by appellant, who has appropriated the property to his own use; that, after appellee had paid \$100, she demanded of appellant that he execute to her a deed, which he refused to do; that afterwards, and while she was in nowise in default in the execution of the contract, she again demanded a deed, which he refused, and still refuses, although appellee has at all times been ready and willing to execute the note and mortgage upon receiving from appellant a deed; that, after appellee had demanded a deed, appellant voluntarily, and without being required or requested so to do by appellee, paid taxes on the property in the sum of \$25.28, which amount so paid appellee never agreed nor promised to repay; that the taxes accrued after the first \$100 of the principal sum in addition to the interest had been paid on the contract; that \$15.89 of this amount was for delinquent taxes; that appellee has paid to appellant, including the rental value of the property during the time appellant has wrongfully held possession,

the full purchase price as stipulated in the agreement, and has complied with all the conditions of the agreement. As conclusions of law it is stated that appellee is entitled to a deed and to possession, and that her right to have the contract specifically enforced dates from the time she demanded a deed in 1895, and appellant's refusal to execute a deed.

It is argued at some length that the findings are not sustained by sufficient evidence; that the court erred in its conclusions of law and in overruling certain motions to modify the judgment. The findings by the court are within the issues presented by the pleadings, and upon a careful consideration of all the evidence it is manifest that the findings are supported by the evidence. The trial court was the exclusive judge of the credibility of the witnesses. No good purpose would be subserved by a discussion of the evidence. There is evidence in the record to support the findings of fact made by the court.

There is no error of which appellant can complain in the conclusions of law upon the facts found. Appellee, under the facts found, had paid the full purchase price of the lot, and was entitled to a deed when she first made a demand for it. The conclusions of law are right upon the facts found.

Appellant's several motions to modify the judgment were properly overruled. The judgment rendered is the only judgment authorized by the conclusions of law. The motions sought only such changes in the judgment as would have made it not in accordance with the conclusions of law. If a judgment conforms to the conclusions of law a motion to modify the judgment can not prevail. The statute (§560 Burns 1901) provides that in a special finding the court shall first state the facts in writing, and then the conclusions of law upon them, "and judgment shall be entered accordingly." *Nading v. Elliott*, 137 Ind. 261; *Smith v. McKean*, 99 Ind. 101.

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There is no error in the record. The record shows that the merits are entirely with the appellee. Judgment affirmed.

BROWN v. REEVES & COMPANY.

[No. 4,624. Filed October 27, 1903.]

QUIETING TITLE.—Tax Sale.—Description.—A description of real estate in a notice of tax sale and certificate of sale as “lot one, Col. W. Co.” is too indefinite and uncertain to support a suit to quiet title. *pp. 518, 519.*

TAX SALES.—Description.—Section 8601 Burns 1901 requires that land be advertised for tax sale by same description as on tax duplicate. *pp. 519, 520.*

SAME.—Imperfect Description.—Lien.—Where in a suit to quiet title to lands under a tax sale certificate it appeared that defendant had obtained title through a sale and subsequent conveyance under a partition proceeding, and there was nothing of record to show that the land had been sold for taxes because of the imperfect description thereof, the court properly held that the tax sale was invalid and did not convey title, but that the lien of the State was transferred to plaintiff, and that he was entitled to a first lien for the amount he paid together with penalties and interest. *p. 520.*

From Bartholomew Circuit Court; *F. T. Hord*, Judge.

Suit by James S. Brown against Reeves & Company to quiet title. From a judgment for defendant, plaintiff appeals. *Affirmed.*

W. H. Everroad and *C. B. Cooper*, for appellant.

Marshall Hacker and *R. H. Spaugh*, for appellee.

WILEY, J.—Action by appellant against appellee to quiet title to real estate. Trial by court. Finding and judgment against appellant. Appellant moved for a new trial for the reasons: (1) That the decision of the court was not sustained by sufficient evidence; and (2) that the decision of the court was contrary to law—and this motion was overruled. Such ruling is the only error assigned. Appellant claims title by virtue of a tax sale, and deed thereunder.

There is one reason at least why the judgment can not be disturbed under the evidence: The real estate was not properly described in the notice of sale. The correct description of the property in controversy is: "Lot one in the Columbus Wheel Company and M. T. Reeves' addition to the city of Columbus." It was advertised for sale for delinquent taxes as "Lot 1, Col. W. Co." The county auditor entered the sale on the register of sales in his office as follows: "1 Col. W. Co. & M. T. R. the whole." On the tax duplicate for 1885 the real estate was described as follows: "Description of land and name of town, Col. W. Co. In-lots one." The lot was returned as delinquent for the unpaid taxes of 1885, and was sold at tax sale February 14, 1887, for such delinquency and the taxes of 1886. Appellant, as purchaser, received a certificate of sale, but did not surrender it to the auditor or demand a deed until May 2, 1901. The description "lot 1, Col. W. Co." is too indefinite and uncertain, and in fact is meaningless. It does not give sufficient data from which the real estate could be located. From the description a competent surveyor could not identify or find the lot. There is no means known to the science of surveying by which its correct description could be ascertained. It follows that the maxim, "*certum est quod certum reddi potest*" is not applicable here for the reason that there is no means of making certain that which is so uncertain and indefinite. The rule only applies where there is some means, either by computation, measurement, or, in such case as this, the science of surveying, that what is uncertain may be made certain.

Thus, in *Becker v. Baltimore, etc., R. Co.*, 17 Ind. App. 324, it was held in a street improvement case that "tract of land, north side, between Front street and O. & M. R. R." did not describe any tract of land, and that it did not furnish any data from which its true description might be ascertained. And in *Lake Erie, etc., R. Co. v.*

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Walters, 9 Ind. App. 684, it was held that the description "L. E. & W. R. R. Co. Ft. front 134, Right of way," was insufficient to fix a lien for a street assessment. To the same effect is the holding in *Cleveland, etc., R. Co. v. O'Brien*, 24 Ind. App. 547. In the case of *State, ex rel., v. Casteel*, 110 Ind. 174, 186, it was held that an insufficient description of the land in a tax sale will defeat the title, but will not defeat the lien. It was there said: "The lien will hold if the purchaser can show what property was intended to be taxed, but the title will not pass if the description is defective." The same rule has been adhered to in subsequent decisions. *Morrison v. Jacoby*, 114 Ind. 84; *Millikan v. City of Lafayette*, 118 Ind. 323; *Hall v. Barnes*, 123 Ind. 394; *City of Logansport v. Case*, 124 Ind. 254. The sale of the real estate in controversy, upon the notice given, was invalid, and hence did not convey title under the express provision of the statute. Section 8631 Burns 1901 provides: "No sale or conveyance of land for taxes shall be valid, * * * if the description is so imperfect as to fail to describe the land or lot with reasonable certainty," etc.

The rule, as indicated by the authorities above cited and the statute just quoted, obtains in other jurisdictions, as illustrated by the following cases: *Wallace v. Brown*, 22 Ark. 118, 76 Am. Dec. 421; *Bidwell v. Webb*, 10 Minn. 59, 88 Am. Dec. 56; *Jackson v. Sloman*, 117 Mich. 126, 75 N. W. 282; *Upton v. People, ex rel.*, 176 Ill. 632, 52 N. E. 358; *Turner v. Hand County*, 11 S. D. 348, 77 N. W. 589; *Van Cise v. Carter*, 9 S. D. 234, 68 N. W. 539; Black, Tax Titles, §112; *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724; *Woods v. Freeman*, 1 Wall. 398, 17 L. Ed. 543; *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497; *Lawrence v. Fast*, 20 Ill. 338, 71 Am. Dec. 274.

Another reason why the sale for taxes is invalid in this case, is because the lot was not advertised for sale in the

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description as the same was described on the tax duplicate. The statute requires this to be done. §8601 Burns 1901.

Appellee obtained title to the real estate through a sale and subsequent conveyance under a partition proceeding, and there was nothing of record to indicate that it had been sold for taxes, because the attempted description in the notice of sale and register of sales was no description at all, and therefore it was not notice to it. The court below held that the sale was invalid, and did not convey title, but that the lien of the State was transferred to appellant, and gave him a first lien for the amount he paid, together with penalties and interest, including subsequent payments. The amount was ascertained by the court, for which judgment was rendered, and declared to be a first lien. This result is in harmony with the statute and decided cases. §8632 Burns 1901; *Sloan v. Sewell*, 81 Ind. 180; *Reed v. Earhart*, 88 Ind. 159; *Peckham v. Millikan*, 99 Ind. 352; *Scott v. Millikan*, 104 Ind. 75; *State, ex rel., v. Casteel, supra*; *Travellers Ins. Co. v. Martin*, 131 Ind. 155; *Scarry v. Lewis*, 133 Ind. 96.

The abbreviations, purporting to be a description of the real estate disclosed by the notice of sale have no fixed meaning. "Col." does not stand for nor signify Columbus, "W." does not stand for "wheel" and "M. T. R." does not stand for "M. T. Reeves." Our conclusion is that the sale was invalid, and the subsequent conveyance under it did not convey title, because of a failure properly to describe the real estate in the notice of sale.

Appellant urges upon us the proposition that a tax deed is *prima facie* evidence of the regularity of the sale, and of the title in the holder. This is both statutory and adjudicated law, and there is no contention to the contrary. §8624 Burns 1901; *Richard v. Carrie*, 145 Ind. 49; *Doren v. Lupton*, 154 Ind. 396. But appellant's *prima facie* case as made by his tax deed is overthrown by the facts disclosed by the record, and about which there is no

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conflict. Counsel have discussed other questions, but the view we have taken of the law as applied to the evidence makes it unnecessary to decide them.

There is no reversible error in the record. Judgment affirmed.

PARKHURST ET AL. v. SWIFT.

[No. 4,801. Filed October 28, 1903.]

MASTER AND SERVANT.—Injury to Lent Servant.—Independent Contractor.

—*Construction of Elevator.*—Defendants contracted to construct an elevator in a factory of a paper company for a certain sum, and sent their agent to construct same. The paper company agreed with the agent to furnish three men, including plaintiff, to assist in constructing the work, and to deduct the cost of their labor from the contract price. The agent assisted in the work, and in so doing removed a brace from a scaffold which rendered same dangerous, and liable to fall. He directed plaintiff to saw an opening in the second floor, and while he was so at work, directed another servant to go upon the top of the scaffold and oil machinery. The scaffold gave way and a portion thereof fell and struck plaintiff, injuring him. *Held*, that defendants were liable for the injuries sustained by plaintiff.

From the Superior Court of Madison County; *H. C. Ryan*, Judge.

Action by Benjamin F. Swift against John W. Parkhurst and others. From a judgment for plaintiff, defendants appeal. *Affirmed*.

W. A. Kittinger and *W. S. Diven*, for appellants.

Alfred Ellison and *W. S. Ellis*, for appellee.

BLACK, J.—The appellee recovered judgment against the appellants in an action for damages for a personal injury. There were three paragraphs of complaint, but before trial the appellee dismissed as to the first paragraph. The Alexandria Paper Company was a defendant with the appellants, but the court sustained its motion, at the close of the evidence, to instruct the jury to return a verdict for that defendant. A demurrer of the appel-

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lants for want of sufficient facts to each of the second and third paragraphs of the complaint was overruled.

So far as the second and third paragraphs differ one from the other, it appears from the record that the verdict was based on the third paragraph, rather than the second, and an examination of the third paragraph alone will be sufficient. It was, in substance, alleged therein that the paper company was a corporation, and that the appellants were partners doing business under the firm name of Parkhurst Bros. & Co., and were engaged in constructing elevators and in putting them in place and operation; that on and before December 14, 1899, the paper company was constructing a large factory building in the city of Alexandria, Madison county, Indiana, and at that date and immediately prior thereto the appellants, as partners, were constructing an elevator and putting it in place and operation in the factory building for the paper company; that the contract and arrangement between the paper company and the appellants by which the latter were building the elevator was to the appellee unknown; that he was a carpenter by trade, and for many weeks prior to the date mentioned he was in the employ and under the direction and control of the paper company, and working in and upon the factory building, except as hereinafter stated; that about four days prior to December 14, 1899, the paper company ordered and directed the appellee to go to work for the appellants, and in all things to obey the orders and directions of the appellants, and to work for and assist them in putting in the elevator in the factory building, which directions and arrangements were agreed to and fully acquiesced in by the appellants; that, pursuant to these orders and directions, he did, about four days prior to the date mentioned, go to work for the appellants in and upon the construction of the elevator and putting it in place in the building, and he so continued to work for the appellants until the injury complained of

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herein; that in constructing the elevator the defendants entrusted the work and the supervision thereof wholly and exclusively to the agent and superintendent of the appellants; that his name was unknown to the appellee; that this agent and superintendent of the appellants had the exclusive supervision and control of the conditions surrounding the work, and the sole and exclusive management, control, and supervision of all the work of constructing the elevator and putting it in place and running order, and had at all times full authority to employ or discharge such hands as he deemed necessary to the proper prosecution of the work, and had at all times full and complete authority to direct when and where and how and with what tools and appliances each and every hand engaged in and upon the work of constructing the elevator and putting it in place and running order should work, and in all the work and supervision and control thereof this superintendent acted in all things for and instead of the defendants; that on the day above mentioned, and for four days prior thereto, the appellee was and had been continuously working upon the construction of the elevator and putting it in place and running order in the factory building, and was under the exclusive control and direction of this agent and superintendent; that about three days before December 14, 1899, the appellants had cut a large hole about six by seven feet in both the second and third floors of the factory building, for the purpose of allowing the elevator to pass through these floors in its ascent and descent when in operation, and at the same time the appellants constructed a large wooden scaffold about eight feet above the third floor, which scaffold was constructed by standing four small scantlings of timber on end on that floor, one of which was placed on the floor just outside of each of the corners of this large hole or opening on the third floor; that the appellant nailed cross-timbers to these upright scantlings about eight feet above the third floor,

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and laid on these cross-timbers heavy wooden boards for a flooring for the scaffold; that the appellants then braced and stayed the scaffold by nailing slats of timber from the base of each upright timber to the top of the next upright timber, and then crossing such braces with other braces at right angles and nailing the same to the upright timbers at top and bottom; that the scaffold so completed was directly over the hole above mentioned in the third and second floors—all of which facts were at all times known to the paper company; that on December 14, 1899, while the appellee, pursuant to the orders and directions of the paper company, was working for the appellants, and while he was under the exclusive and absolute control and directions of the agent and superintendent above mentioned of the appellants and the paper company, this superintendent ordered and directed the appellee to take a hand-saw and saw an opening, or make a small hole, in the second floor of the factory building at the edge of the large hole in the floor, the small hole being for the purpose of an opening through which a cable rope for raising and lowering the elevator was to pass; that the appellee at once went to work sawing out the small hole, and while he was so at work the superintendent, while in the line of his duty as such, negligently and carelessly knocked loose and took away said braces of the scaffold, well knowing that the appellee was working under the same, and that it was rendered liable, by that act of removing the braces, to fall, and the timbers thereof to strike and injure the appellee; that the superintendent, when this was done, well knew that it would render the place where the appellee was at work a very hazardous and dangerous one; that about two hours after this removal of the braces, and while the appellee was still at work sawing out the hole in the second floor, the superintendent, while in the line of his duties as such, carelessly and negligently ordered one of the employes of the appellant to go upon the third floor

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factory building and climb on the scaffold to do work thereon wholly disconnected with the work the was doing; that the superintendent, at the time ordered the said employe so to go upon the platform, knew that his act in so ordering the employe, and the employe in obeying the order, would result in the scaffold where the appellee was working a very dangerous one, and that the same was liable to fall, or a part thereof, down on the appellee and injure him, and the superintendent knew of this act in removing the braces and in ordering the employe to go upon the scaffold and was liable to be thrown down and to fall upon and injure the appellee; that in obedience to said command of the superintendent the employe attempted to go upon the platform, when, by reason of the braces being removed from the timbers thereof and the attempt of the employe to climb upon the platform, the scaffold and the timbers thereof separated and fell apart, allowing and causing one of the heavy boards on the scaffold to fall through the hole in the third floor in such a way that it struck the appellee upon the back and side and greatly and permanently injured him. His injuries and expenses were here stated in detail. It was alleged that the appellee at no time had any knowledge or notice, before he was injured, that the braces had been removed from the frame of the platform, or that anyone was ordered to go upon the platform, or was attempting or about to go upon it; that the injury was brought about wholly and solely by reason of the negligence of the agent and superintendent and the negligence of the paper company in not providing and maintaining a safe place for him to work in, and the negligence of the superintendent in removing the braces from the scaffold and ordering said employe to go and causing him to attempt to go upon the scaffold as aforesaid, and thereby making the place where the appellee was at work an unsafe,

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dangerous, and hazardous one in which to work; that by his said injuries so received he was damaged in the sum of, etc., for which he demanded judgment against each and all of the defendants.

With the general verdict in favor of the appellee the jury returned answers to interrogatories, and the court overruled a motion of the appellants for a judgment in their favor thereon notwithstanding the general verdict. It was thus specially found that the appellee had been working as employe doing general carpenter work for the paper company prior to December 10, 1899; that the paper company contracted with the appellants to furnish and put in an elevator in the factory building for the sum of \$325; that a man named Gentry came to Alexandria, where the factory was, to put the elevator in the factory, and the paper company supplied three men from its employes to assist in the putting in of the elevator, in the putting in of which the appellee was injured. These three men were Benjamin F. Swift, the appellee, and one Weaver and one White, all three being regular employes of the paper company. The paper company settled with these three men for their wages, the same as it had been doing regularly, for the time they worked in putting up the elevator. The paper company afterward settled with the appellants, and paid them the first contract price, less the amount of wages of the three men; and this was all the paper company paid to the appellants.

Interrogatory ten and the answer thereto were as follows: "Did Parkhurst Bros. & Co. directly employ the plaintiff and Weaver and White to assist in putting up the elevator where the plaintiff was injured? A. Yes, by their agent." It is found that the three men assisted in putting up the elevator by direction of the superintendent or agent of the paper company for them to assist Gentry in putting it up. There was no employment of the three men to assist in putting up the elevator other than the general em-

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ployment by the paper company for which they had been working for some months, and they were directed by the agent or superintendent of the company to assist in putting up the elevator. Interrogatory fourteen: "If the plaintiff did any work in putting up the elevator, in the work of which he was injured, under any other employment than his employment by the Alexandria Paper Company, you may state when he was so employed and by whom. A. The morning the elevator man came, by Parkhurst Bros. & Co.'s agent." The paper company, after it had made its contract with the appellants, agreed with them that it would furnish a part of the labor of putting in the elevator, and that the amount of the labor so furnished should be deducted from the contract price, and that it would pay them \$325, less the value of labor furnished; and the paper company paid to the appellants that sum, less the value of such services. All this was at Gentry's request. The jury found that there was evidence that Gentry bore to the appellants the relation of agent. He came, not to assist in the putting up of the elevator, but to put it up. He had authority given him by the appellants to employ or discharge others in the work of putting in the elevator. He did not make any contract with the appellee or Weaver or White for them to work in putting in the elevator. The members of the firm of Parkhurst Bros. & Co., at the time when that firm was putting in the elevator and when the appellee was hurt, were the appellants. They constituted a partnership. The duty of Gentry, under and by virtue of his employment by the appellants, was to install the elevator. His authority to hire or discharge men for the appellants was as their agent. Gentry and the appellee and Weaver and White were the only persons that worked on the job. They all worked at manual labor, and assisted each other in the entire work until the appellee was injured. On the day on which the appellee was injured, the persons, or a portion of them, engaged in the work, built

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a scaffold eight feet high on the third floor of the building over the hatchway which had been cut out for an elevator. The parties engaged in putting in the elevator had been working in and about the scaffold until about noon of the day of appellee's injury. Appellee was a carpenter of ten or eleven years' experience. The second floor had been laid around and near the hatchway. The appellee was engaged in the afternoon in sawing a small hole through the floor in the second story, for the rope of the elevator, immediately east of the hatchway, and connected therewith. A board was laid from north to south across the hatchway close to its east side. The appellee was standing or kneeling on the board and sawing out the small hole. One of the braces had been taken from one side of the scaffold on the third floor just before noon of the day on which he was injured. Weaver was present and saw the brace taken away, and knew it was taken away. While appellee was engaged in sawing the small hole, Gentry, Weaver, and White were engaged in the basement in some duties about the elevator work, and while they were there Weaver took some grease, and went to the third floor to grease some pulleys which had been put up over the scaffold there. When he got to the third floor he did not know that, if he undertook to climb upon the scaffold from which the brace had been removed, or upon the southeast part thereof, the scaffold would thereby be pulled apart, and be liable to let a board on the scaffold fall down. He attempted to climb up the southeast corner of the scaffold, and in doing so he pulled the scaffold apart, and let a board fall, which struck and injured the appellee. He could not have climbed in safety upon the scaffold at another place. He climbed up the scaffold without thinking or paying any attention to the fact that the brace had been removed. He did not know, before he undertook to climb up, that, if he did so, he would pull the scaffold apart, and did not undertake to climb up carelessly and negligently, and without thinking

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what he was doing. There were not at that time about the scaffold or on the third floor any other persons who were or had been engaged in the work of putting in the elevator, or concerned in that work, when Weaver undertook to climb upon the scaffold.

The appellee was not injured by Weaver's unthoughtedly undertaking to climb upon the scaffold when he knew that to do so would pull it apart and let the board fall. The scaffold was immediately over the opening or hatchway on the third floor through which the elevator was to pass, and the opening or hatchway through which the elevator was to pass in the second floor was immediately under that in the third floor, and under the scaffold. The appellee knew that the scaffold on the third floor was built over the hatchway or opening in that floor. If he had been standing on the floor of the second story where he was at work, when he was injured, sawing the opening in that floor, the board which fell would have struck him. He was standing or kneeling on a plank, across the hatchway, bending over and sawing with one foot on the board and one on the floor. To an interrogatory asking if there was anything in the way of his standing on the floor and sawing a hole in the floor, at which work he was engaged when injured, the jury answered in the affirmative. It would not have been a safer place for him to have sawed the hole to stand or kneel on the floor than to stand or kneel on the plank. He could have performed the work he was engaged in doing by standing or kneeling on the floor immediately east of the hole he was sawing in the floor, but at a disadvantage; and he could not thus have done the work as well as by standing or kneeling upon the board across the hatchway and immediately west of the hole he was sawing, on account of the elevator guide. The injury was not caused by the unthoughtful act of Weaver doing what he knew would cause the scaffold to separate and cause the

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board to fall. There was nobody near or about Weaver to see him when he attempted to climb up the scaffold. It was answered that Weaver would not have climbed up the scaffold at a place where it would have been safe, and would not have pulled the scaffold apart, if he had thought about the danger which he knew existed. When he attempted to climb up the scaffold, he immediately realized that he had pulled it apart, and at once called out in a loud voice to watch out below, and the board continued to fall from the scaffold and struck the appellee. The appellee had been assisting in the work on the elevator in the afternoon on which he was injured along with other men working on the elevator on the scaffold on the third floor. He went with Gentry from that floor to the second floor a short time before he was injured, and when he started down he left Weaver and White on the third floor, and the appellee at once commenced sawing out the hole, in the work at which he was injured. He knew that Weaver and White were assisting, along with himself and Gentry, in putting in the elevator.

The general subject of the duty of the master to provide for the servant a safe place and safe appliances for his work need not be discussed. The case proceeded upon the theory of the liability of the appellants for failure properly to discharge such duty. The most important discussion of counsel has reference to the relation of the parties concerned. The work undertaken by the appellants was in their special line of business, and the providing of the elevator and placing it in the building in running order constituted one entire undertaking for a single definite price, the materials and labor to be provided by the appellants, the paper company providing only the building in which it was placed, and the appellants being responsible to the paper company for the result alone, and not being under its control and direction in the doing of the work. It seems sufficiently clear that the appellants were inde-

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pendent contractors. The appellee and Weaver and White had been continuously the servants of the paper company. That company had not contracted to provide any of the necessary labor or assistance, but at the request of the agent of appellants it furnished the three workmen, for whose services the appellants paid indirectly by allowing a deduction of the amount of their compensation from the contract price, the wages of the workmen being directly delivered to them by the paper company. While these men were thus employed they were not under the control and direction of the paper company as to their work, but they were for the time and in that work the servants of the appellants, and were under the entire control and management of the agent Gentry, who alone represented the appellants on the ground and in the work, with full control as to the manner of performance and authority to employ the needed assistance and to discharge workmen so engaged by him. The fact that Gentry himself performed manual labor along with the men so provided by the paper company did not render him any the less the superintendent and sole representative of the appellants in the work of putting in the elevator. It was more convenient and to the advantage of the appellants that he should thus engage in the work, whose needs he understood. It was as if an independent contractor had himself taken manual part with his workmen. Gentry was a vice-principal, and the appellee, while a servant of the appellants for the occasion, was not his fellow servant in the doing of the work in which he was injured. The duty of the appellants to provide and maintain a safe place for the appellee in the doing of the work of his employment was devolved upon Gentry; and the appellants were responsible for the manner in which he performed that obligation. The act of Weaver in attempting to climb upon the scaffold caused it to spread, and the board to fall and injure the appellee; but that act was one for which the scaffolding should have been sufficient. It was rendered insufficient,

not in its original construction, but by the removal of the brace. Weaver did an act which was not improper to be done, and which might have been done safely if the appliance which he was required to use had been a proper one. The proximate cause of the injury was the unsafe condition of the scaffold, rendered so by Gentry, through whom the appellants had the right to accept or reject the services of the appellee, and control and direct him; the will of Gentry, and therefore of the appellants, being represented in the result and in the details of the work performed by the appellee.

Higgins v. Western Union Tel. Co., 156 N. Y. 75, was an action for a personal injury sustained by the plaintiff while engaged in using an elevator in the defendant's building. A contractor for restoring the building, which had been injured by fire, was to furnish elevators, and they had been placed in the building. The contractor had not completed his contract, and had not turned over the elevators to the owner of the building, but they were still subject to the contractor's use in carrying material and workmen. The plaintiff, a plasterer, in the employ of the contractor, was directed by him to plaster the elevator shaft, for which purpose the elevator was used as a platform. It was necessary to move the elevator up and down, and the contractor, instead of using one of his own men for that purpose, found it more convenient and economical to procure a man who was a general servant of the defendant, and in his employment for the purpose of running the elevator for passengers—a use permitted during some portions of the day. The plaintiff's injury was caused by the negligent act of this conductor of the elevator. It was held that the conductor was engaged, not in the work of the owner of the building, but in that of the contractor, and the former was not responsible for the injury. The court said that the true test in such cases is to ascertain who directed the movement of the person committing the injury,

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and quoted from *Rourke v. White Moss Colliery Co.*, L. R. 2 C. P. D. 205, as follows: "But when one person lends a servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." See, also, *Cotter v. Lindgren*, 106 Cal. 602, 46 Am. St. 255; *Brown v. Smith*, 86 Ga. 274, 12 S. E. 411, 22 Am. St. 456; *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691, 17 Am. St. 925; *Pioneer, etc., Construction Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17; *Miller v. Minnesota, etc. R. Co.*, 76 Iowa 655, 39 N. W. 188, 14 Am. St. 258; *Scarborough v. Alabama, etc., R. Co.*, 94 Ala. 497, 10 South. 316.

The uncertainty of the complaint as to the relation between the paper company and the appellants because of the appellee's alleged want of knowledge of the contract between them, and the allegation to the effect that Gentry represented all the defendants, can not work a reversal of the judgment because of the overruling of the demurrer. It is sufficiently shown that he was not a fellow servant with the appellee.

It turned out, as shown by the findings of the jury, that Gentry was the superintendent of the work, representing therein the appellants as independent contractors; and the source of the payment of the wages of the appellee could not alone determine the question as to who was his master for the time being.

Under the statute of 1899 (359a Burns 1901) it was not necessary for the appellee to plead want of contributory negligence.

There is nothing in the special findings of the jury irreconcilably in conflict with the general verdict. The evidence might have supplied facts necessary to support the general verdict, whose existence is not affirmed or denied by the special findings. Thus, it appears in the evidence

that the brace was knocked off the scaffold by the direction of Gentry in the course of the work on the elevator, and was not thereafter restored; that Weaver went alone from the basement to the third story to grease some pulleys above the scaffold by direction of Gentry; and that appellee had no notice of the removal of the brace, and no notice that Weaver or any other person was in the third story, until he heard him call, "Look out."

The sufficiency of the evidence is questioned, but we are unable to disturb the conclusion of the jury thereon.

Some questions are also made concerning the admission of evidence and relating to instructions to the jury, but they do not seem of sufficient importance to warrant the lengthening of this opinion by discussion thereof.

We do not find any reversible error in the record. Judgment affirmed.

GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN v. MARSHALL.

[No. 4,437. Filed October 28, 1903.]

BENEFICIAL ASSOCIATIONS.—*Failure to Pay Assessments.—Forfeiture.*—

In a suit on a policy in a fraternal insurance company, the defendant pleaded a forfeiture because of the failure of assured to pay assessments in accordance with the laws of the order and notice given assured. The laws of the order provided that when the finances were in a certain condition a call should be made and that every call should contain a list of all deaths occurring since the last call was made, such notice to be issued by the grand recorder with the approval of the finance committee, and published in a newspaper printed and published in the State in the interest of the order and that such publication should constitute a sufficient notice to members. The answer alleged that notice of an assessment was published in the official organ of the order containing a list of the deaths and the names of the lodges to which they belonged, followed by a call upon the subordinate lodges, signed by the grand recorder and the members of the finance committee, and that a copy of said paper was mailed to the post-office address of assured, and that assured failed to pay said as-

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assessment or any subsequent assessments. *Held*, that the facts pleaded constituted a bar to a recovery. pp. 535-544.

BENEFICIAL ASSOCIATIONS.—Forfeitures.—Though forfeitures are not favored by the law, it is the duty of the courts to declare a forfeiture upon facts which will admit of no other conclusion. p. 544.

SAME.—Failure to Pay Assessments.—Suspension by Operation of Law.—Where the by-laws of a society provide that the failure of a member to pay an assessment within a stipulated time operates as a forfeiture of membership, no affirmative action on the part of the lodge to suspend the delinquent member is required. p. 545.

From the Superior Court of Vanderburgh County;
W. M. Wheeler, Special Judge.

Action by Addie R. Marshall against the Grand Lodge of the Ancient Order of United Workmen. From a judgment for plaintiff, defendant appeals. *Reversed*.

C. L. Wedding, for appellant.

G. K. Denton and *L. A. Whitcomb*, for appellee.

WILEY, J.—Appellant is a fraternal, benevolent, and mutual benefit association, and as such issued to one Charles E. Marshall, who was the husband of appellee, a certificate of membership, by the terms of which it undertook to pay appellee, as beneficiary, \$1,000 at the death of the insured, according to the terms of the certificate. The said insured died November 12, 1900, being about sixteen months after the certificate was issued. Appellant refused to pay the claim, and appellee brought an action on the certificate to enforce payment. The case was put at issue, and tried by a jury, resulting in a verdict for appellee. Appellant's motion for a new trial was overruled, and judgment pronounced upon the verdict.

Two questions are presented for decision, viz.: (1) The sufficiency of the first paragraph of answer, to which a demurrer was sustained; and (2) the overruling of the motion for a new trial.

In the first paragraph of answer it is alleged that from the date of the issuing of the certificate to September, 1900, the insured paid to the financier of his lodge an assessment

each and every month as specified by the beneficiary law of the order, and that each assessment was payable on or before the 28th of each month; that the said insured was bound to know the laws of the order, and did in fact have full knowledge thereof, and knew by the payment of his assessments each month from the date of his membership until September, 1900, when he neglected and failed to pay the assessment for September, 1900, on or before the 28th of the month; that not only did he have knowledge from said payments and course of business with his lodge as to his duty to pay an assessment in September, 1900, but knew and was bound to know of the existence of the laws of the order; that in addition to the requirement to pay an assessment for said month, as set out by the constitution and by-laws, a further and additional notice was given to the insured as to such assessment by the grand recorder calling upon all the lodges in the State, including the lodge to which he belonged, to forward the beneficiary funds in their respective treasuries, and at the same time made one assessment upon each of the members (said assessment being necessary to pay death losses), with the approval of the grand lodge finance committee, and caused such call and assessment to be published in the Hoosier Watchman, the official organ of the order in Indiana, and that a copy thereof was duly mailed to the insured, properly addressed; that by reason of his knowledge of the constitution and laws of the order, and by his course of dealing with said order, the insured was specially called upon and notified of the assessment of seventy-two cents for the month of September, 1900, that the same must be paid on or before the 28th of said month, and that upon failure so to pay he would be suspended; that the assessment and notice for September, 1900, were in the same form, substance, and words used and published of assessment notices, and the approval of the grand lodge finance committee, during each and every month during the time said Marshall was a mem-

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ber of the order; that during each and every one of said months during the entire membership of the insured he acted upon and treated said assessments, notices, and the approval of said finance committee as valid and sufficient, by paying, without objection or question, his assessments for each and all the months of his membership; that having failed to pay the assessment for September, 1900, and having paid nothing thereafter, he then and there became and stood suspended from all rights, privileges, and benefits of the order, and the beneficiary certificate sued upon thereby became null and void, and that when he died November 12, 1900, he was not a member of appellant order, and was not in good standing, and neither he nor appellee had or have any rights or claims whatever upon appellant. The constitution and by-laws of the order, the notice of the assessment and call upon the beneficiary fund for September, 1900, together with a copy of the Hoosier Watchman, in which the notice of the assessment and the call upon the beneficiary fund were published, and the approval of the finance committee are all filed as exhibits to this paragraph of answer.

By the demurrer the appellee admits the truth of all facts stated in the answer that are well pleaded. She therefore admits that notice of the assessment against the deceased was made for September, 1900, and also admits that said assessment was not paid, and further, that other payments were never made after that. Counsel for appellee seek to avoid the force of these admissions on the ground that the notice of the assessment was not in conformity with the laws of the order, and hence the insured was not bound by it; also that because the assessment was not legally made he was not required to pay; and, for his failure to pay, he did not forfeit his membership and his beneficiary rights. There is substantial substance and merit in this contention, provided the notice was illegal and not in conformity with the laws.

If we correctly understand the position assumed by counsel, it is (1) that the call for the September assessment and notice does not contain a list of deaths occurring since the last call, and (2) that the call and notice were not approved by the grand lodge finance committee. These two questions depend for decision upon the laws of the order, and the assessment and call as made.

The assessment rates of the order are fixed by its constitution, and they are graded according to the age or ages of the members. The assessment which was made against the deceased in this case on the 1st of September, 1900, was for seventy-two cents; he belonging to the class against whom such assessment was authorized by the laws of the order.

Subdivisions seventeen, eighteen, nineteen, thirty, and thirty-nine of section ninety-eight of the constitution, or so much of subdivision nineteen as may be necessary to present the question, are as follows: "(17) Calls and Assessments. Whenever the beneficiary fund of the grand lodge treasury shall have been reduced to a sum less than \$6,000, or when by reason of unavoidable delay in the payment of beneficiary claims, the balance of the beneficiary fund in the grand lodge treasury would, by the payment of said claims, be reduced to a sum less than \$6,000, then it would be the duty of the grand recorder to call upon the subordinate lodges to forward the beneficiary fund in their respective treasuries, and, at the time of making such call, to make one assessment upon each member of the order who received the workman degree, previous to the date upon which the assessment is made. (18) Calls, When and How Made. Every call made upon subordinate lodges to forward beneficiary funds shall be dated upon the first or second day of the month, shall contain a list of all deaths occurring since the last call was made, all necessary instructions relative to forwarding the funds called for, and shall, in every case, receive the approval

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of the grand lodge finance committee. The issuing of such call shall constitute the making of an assessment. (19) Assessments, How Made. All assessments made upon the members shall be dated upon the first day of the month, except that if such date shall fall on Sunday or a legal holiday, it shall be dated on the second day of the month, and shall contain a list of all deaths occurring since the last assessment was made. Notice of such assessment shall be issued by the grand recorder with the approval of the finance committee, and published in a newspaper printed and published in this State in the interests of the A. O. U. W. order, which publication is hereby constituted and made the official, legal, and sufficient notice to the members of this grand jurisdiction of assessments levied, without any further notice either from the grand or subordinate lodge officers. A sufficient number of copies of said paper shall be issued every month to supply all the members, and a copy thereof shall be mailed to the last known and usual postoffice address of each member of this grand jurisdiction; and also one copy to the recorder of each lodge by its publisher, not later than the fifth day of each month.”

“(30) Penalty for Failing to Pay Assessments. Any member failing or neglecting to pay all the assessments made upon him for the beneficiary or relief funds to the financier of the lodge of which he is a member on or before the twenty-eighth day of the month in which said assessments are made, shall forfeit all his rights as a member, and shall stand suspended from all the rights, benefits, and privileges of the order from and after that date, and shall not be reinstated except as herein provided.”

“(39) When Rights are Forfeited. When a member shall be suspended or expelled from the order, through any cause whatever, he forfeits all rights, benefits, and privileges, and his beneficiaries thereby lose all rights to any portion of the beneficiary fund.”

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In the answer under consideration, it is averred that the Hoosier Watchman, published at the city of Evansville, Indiana, was the official, legal organ of the order in this State, and that it was in that paper that the notice of the assessment against the deceased for the month of September, 1900, was published, and that a copy of that paper, containing the notice of the assessment, was duly mailed to him. A copy of that paper marked exhibit C is made a part of the answer, and the date of its issue as shown therein, was September 3, 1900. That notice of assessment and call for the beneficiary fund in the various lodges is, in substance, as follows: "Official notice of assessment for September, Grand Lodge Ancient Order of United Workmen of Indiana, September 1, 1900. Whole number of deaths, 717. Whole number of level assessments, 223. Number of classified assessments, 26. To all members of the Ancient Order of United Workmen of Indiana in good standing, September 1, 1900. Brothers: You are hereby notified of the following deaths occurring in the membership of the order in this jurisdiction." Then follows a tabulated statement of the deaths occurring since the last call, and in this tabulated statement are the death numbers; the names of the members deceased; the names of the lodges to which they belong; the numbers of the lodges and their location, and the date of the deaths; the respective ages of the deceased; the cause of the deaths; the dates of their joining the order; the rate of the assessment; and the assessment number. The number of deaths reported in this assessment and call were three. Immediately after the tabulated statement is the following: "In order to provide for the payment of the death losses above reported, you are hereby notified that the classified assessment number nine for September, 1900, is hereby levied as per the classified table, to wit." Then follows the classified assessment table, showing the rate of assessment against the various classes of the members according to age, rang-

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ing from eighteen to fifty years and over. The notice then continues: "This assessment is levied against all members in good standing who have received the workmen degree prior to September 1, 1900, as per the attained ages, January 1, 1900. The amounts enumerated in the classified assessment table must be paid to the financier of your lodge on or before September 28, 1900; for failure so to comply you will forfeit all rights, benefits, and privileges as a member of the order, by becoming suspended."

Following this is the call upon the subordinate lodges throughout the State for the beneficiary funds in their respective treasuries, and that call is as follows: "To the subordinate lodges of the Ancient Order of United Workmen in the Grand Jurisdiction of Indiana: You are hereby notified of the following call for the month of September, 1900: Classified call number nine. Classified assessment number nine will be made in the month of September. The beneficiary fund of the grand lodge treasury having been reduced to a sum less than \$6,000, you are hereby notified that to provide for the death losses above reported, and furthermore provide for the prompt payment of death losses that may occur, one call is made necessary upon the beneficiary fund in the treasury of subordinate lodges, to be known as call number nine, and to replace the money drawn from such fund by the call above enumerated. Classified assessment number nine will be made in September. To Pay Classified Call number nine. You are required to forward to Fred Baker, grand recorder, Evansville, Indiana, at once, (1) the beneficiary fund on hand in your respective treasuries, collected from your members during the month of August on classified assessment number eight; (2) the initial assessment of those members who received the workmen degree prior to September 1, 1900, but have not been heretofore liable for assessment; (3) of back assessments paid by members reinstated since the last report." Here follows directions for remittances of this

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fund. This call is signed by "Fred Baker, grand recorder," attested by the seal of the order, and immediately following his signature are these words: "The above orders on the beneficiary fund are hereby approved." This is signed by three members as the "grand lodge committee."

If this assessment and call are in substantial compliance with the provisions of the law above quoted, then they were sufficient, and would be binding on both the insured and his beneficiary. A member of a benevolent beneficiary association is a part and parcel of the corporation, and is chargeable with a knowledge of its laws, rules, and regulations, and its manner of doing business. The notice shows the number of deaths that had occurred since the last assessment, and this must be construed to mean the deaths that had been reported to the grand recorder up to the time the notice was issued, for it is clear that if any deaths had occurred before the issuing of the notice which had not been reported to the grand recorder, they could not have been specified in the notice. It is the duty of the local lodges to report deaths. The rate of the assessment is also specified, the time when it should be paid, and notice given that, if not paid when due, the members failing to pay should forfeit all rights, benefits, and privileges.

Counsel for appellee insist that there is no provision of the laws of the order requiring a member to pay monthly assessments, and as the answer avers such requirement, and the constitution of the order is filed as an exhibit, the exhibit must control. Subdivision fifteen of section ninety-eight of the constitution fixes the rate of assessments, and requires that they be paid monthly, provided that twelve assessments are required to meet death losses. Subdivision thirty, *supra*, requires such payments to be made on or before the 28th of the month in which the assessments are made. This effectually disposes of counsel's objection in this regard.

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It is next urged by appellee that the call upon subordinate lodges for the beneficiary fund does not contain a list of deaths occurring since the last call, as provided by subdivision eighteen, *supra*, and, as the issuing of such call shall constitute the making of an assessment, the assessment made is void, and the insured nor his beneficiary is not bound by it. Subdivisions seventeen, eighteen, and nineteen of the constitution should be construed together with reference to each other, for they all pertain to the same subject-matter. They provide for a call upon subordinate lodges for the beneficiary funds in their respective treasuries when needed, prescribe the manner of making the call, which is constituted an assessment, the manner of making the assessment, and what shall constitute notice to the individual member. There is no provision in the constitution or laws that requires the assessment and call to be issued separately, and to be two different and distinct instruments. On the contrary, the subdivisions of the constitution we have quoted contemplate that they shall constitute one instrument. Subdivision eighteen says that "the issuing of such call shall constitute the making of an assessment." Subdivision nineteen provides that the assessment shall be made the first day of the month, with certain exceptions, and shall contain a list of deaths, etc.; that it shall be published, and a copy sent to each lodge and member. In this instance the assessment and the call are one instrument, signed by the secretary. The assessment is addressed to the members of the order, and the call to the subordinate lodges. This is in harmony with the letter and spirit of the law. The assessment and call are signed by the grand recorder, and approved by the finance committee of the grand lodge.

Assessments of this character are made for but one purpose, viz., to pay death losses of members of the association who have died while in good standing. The evident purpose of the law in requiring the grand recorder to give

a list of the deaths of members, when assessments are made, is to acquaint the members assessed with the facts upon which the assessment is based, for assessments for the beneficiary fund can only be based upon the death of members. It is made the duty of subordinate lodges to report to the grand recorder the deaths that occur in their respective lodges, and such officer can only give a list of such deaths as are officially reported to him. The answer avers that the assessment and call give a list of those who had died since the last call was made. This is a statement of a substantive and issuable fact, and we must presume that the list is a correct one, and contains the names of all those whose deaths had been officially reported.

The appellee complains that the approval of the finance committee only applies to the call on the beneficiary fund, and hence is not in compliance with the laws of the order. This position is not tenable. The "above orders" are approved. This must be construed to mean and include both the notice of assessment and the call. This is made plain by the fact that the payment of said assessment is the only source of the beneficiary fund. Without the payment of the assessment there could be no beneficiary fund. The notice constitutes an order of payment, and notifies the members that if payment is not made within a given time, their rights, benefits, and privileges will be forfeited. We think the notice of the assessment and the call on the beneficiary fund were properly approved, within the meaning of the law.

Our attention is called to the rule of law that forfeitures are not looked upon with favor. We recognize the force and reason of the rule, but it is the duty of the court to declare a forfeiture upon facts which will admit of no other conclusion. We are now dealing with a question of pleading, and the facts stated therein clearly show a forfeiture. Appellant is a "fraternal, benevolent, and mu-

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tual benefit association," in the language of the complaint. As such, it depends for its existence, and the purposes for which it was organized, upon the prompt payment of assessments against its members. It has no other means of paying its death losses, and no other means is contemplated. The association and the individual member have correlative and reciprocal obligations, the one depending on the other.

These obligations are that, to the end that each may derive the contemplated benefits, they must both comply with the requirements of the constitution and laws of the order. So far as the answer shows, appellant did its duty, and the insured failed in his. Members of a benevolent fraternal association are bound by and must be held to a knowledge of its constitution and by-laws; and as a general proposition of law all members must be governed by them in all their dealings with it as members thereof. *Supreme Lodge, etc., v. Hutchinson*, 6 Ind. App. 399; *Grand Lodge, etc., v. King*, 10 Ind. App. 639.

It required no affirmative action of the lodge to suspend the insured for nonpayment of the assessment. The law is well established that if by the laws of the society nonpayment of an assessment operates as a forfeiture, the member must elect every time he is called upon to pay an assessment, either to pay within the stipulated time, or suffer the penalty of loss of membership and to benefits by neglecting or refusing to pay within the time. *Bacon, Benefit Soc.*, 577, 578; *Rood v. Railway Passenger, etc., Assn.*, 31 Fed. 62; *Bosworth v. Western Mut. Aid Soc.*, 75 Iowa 582; *Maginnis v. Aid Assn.*, 43 La. Ann. 1136.

Under subdivision thirty of the constitution, *supra*, a member stands suspended upon failure to pay an assessment on or before the 28th of the month in which it is made. We have examined the authorities cited by the appellee in support of her contention that the assessment

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and call in this case were not in conformity with the laws of the order and therefore the insured nor the beneficiary was not bound by them, but the law as there declared is not applicable to the facts pleaded in the first paragraph of answer. The facts here pleaded bar a recovery in favor of appellee.

This conclusion makes it unnecessary to decide questions presented by the motion for a new trial.

Judgment reversed, and the trial court is directed to overrule the demurrer to the first paragraph of answer.

CITY OF LINTON v. SMITH.

[No. 4,555. Filed October 28, 1908.]

MUNICIPAL CORPORATIONS.—*Defective Streets.*—*Notice.*—*Proof.*—An averment in a complaint against a city for personal injuries sustained because of a defect in a sidewalk, that defendant had notice of the dangerous condition of the sidewalk for a long time prior to the date of the accident, was sufficient, and proof of actual notice by the city of such defect was not necessary. *p. 547.*

NEW TRIAL.—*Newly Discovered Evidence.*—*Cumulative Evidence.*—A new trial will not be granted on account of newly discovered evidence which is cumulative. *p. 547.*

From Greene Circuit Court; *O. B. Harris*, Judge.

Action by Mary Smith against the city of Linton. From a judgment for plaintiff, defendant appeals. *Affirmed.*

D. W. McIntosh and *C. E. Davis*, for appellant.

ROBY, J.—Appellee recovered judgment for \$410. Appellant's demurrer to the complaint was overruled, as was its motion for a new trial. The complaint was in one paragraph, "the gist of which is that appellant, a municipal corporation, was guilty of negligently permitting its sidewalks to be and remain out of repair, and on which sidewalk appellee stumbled, fell, and was injured."

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It is averred that the appellant had notice of the dangerous condition of the sidewalk for a long time prior to the date of the accident. This was a sufficient averment. Notice is not a conclusion, but an ultimate fact. (*Chicago, etc., R. Co. v. Fry*, 131 Ind. 319, 325; *Locke v. Merchants Nat. Bank*, 66 Ind. 353.

It is not necessary to prove actual notice of such defect by the city. *Lyon v. City of Logansport*, 9 Ind. App. 21, 27; *Turner v. City of Indianapolis*, 96 Ind. 51, 59.

The instructions given by the court include a number of inaccurate expressions, but in their entirety they contain a correct statement of the law, which is all that is required. *Citizens St. R. Co. v. Hamer*, 29 Ind. App. 420.

There is no question but that appellee was injured on account of being "up dumped" by a loose board upon a part of the street surface. It is inferable that the board was rotten. The extent of her injury is not so clear. The case was twice tried, one jury disagreeing.

One reason for a new trial stated is newly discovered evidence. The affidavit supporting the motion shows that the proposed evidence tends to prove that the plaintiff, after her alleged injury, used her arm in a manner inconsistent with her claim of injury. Other evidence to the same effect was introduced on the trial, and a new trial will not be granted on account of newly discovered evidence which is cumulative.

It not infrequently happens that in personal injury cases, those clearly entitled to redress for *bona fide* injuries overreach themselves by simulating additional ones. The extent of the injuries to appellee's shoulder is a matter of some doubt, but it is quite possible that she was hurt exactly as she says she was.

Nothing was claimed for ovarian injuries, varicose veins, or nervous shock.

The verdict is not regarded as excessive. Judgment affirmed.

CABELL ET AL. v. MCKINNEY ET AL.

[No. 4,497. Filed October 29, 1903.]

REPLEVIN.—*Verdict.*—*Failure to Find Value of Goods.*—Plaintiff in an action in replevin can not complain of the failure of the jury to find the value of the goods, where the verdict was for the defendant. pp. 549, 550.

MORTGAGES.—*Execution.*—*Plea of Non Est Factum.*—*Instruction.*—*Alteration of Instruments.*—An instruction in the trial of an action to replevin certain goods under a chattel mortgage, in which a plea of *non est factum* was interposed, to the effect that if the mortgagor signed the mortgage before certain words were inserted therein and delivered it in that condition to plaintiff's attorney, then that would be the execution of the mortgage as it then existed, "but that if afterwards the attorney of plaintiff altered it by inserting the words 'in my storeroom in Bedford,' then before such instrument could be of any binding effect upon her, the mortgage would have to be delivered by her to the plaintiffs or their attorney with the words added" did not amount to reversible error, where other instructions given made it clear that the mortgagor had the power of ratification. pp. 550, 551.

SAME.—*Alteration of Instruments.*—*Instructions.*—An instruction to the effect that any knowledge of plaintiffs' attorney as to the alteration of a mortgage after its execution would in law be knowledge to plaintiffs themselves can not be complained of by plaintiffs on the ground that they were only chargeable with knowledge obtained by their attorney while in their employ, where the jury found that the attorney made the alteration complained of as plaintiffs' attorney. pp. 551, 552.

SAME.—*Alteration of Instruments.*—*Evidence.*—Where in an action on a mortgage the defense was interposed that the mortgage was changed after its execution by inserting the words "in my storeroom at Bedford," and it was contended by plaintiffs that the change was ratified by the mortgagor, the court erred in refusing to permit plaintiffs to ask the mortgagor, on cross-examination, after she had testified in her examination in chief as to the execution of the mortgage, if it was not her intention when she executed the mortgage to mortgage the goods in her storeroom. pp. 552, 553.

From Monroe Circuit Court; *Newton Crooke*, Special Judge.

Action by John M. Cabell and another against Susan F. McKinney and others. From a judgment for defendants, plaintiffs appeal. *Reversed.*

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Alexander & Harris, H. C. Duncan and I. C. Batman, for appellants.

J. H. Underwood, J. R. East and R. H. East, for appellees.

COMSTOCK, P. J.—Action of replevin by appellants against appellees to recover the possession of a stock of goods based on a chattel mortgage alleged to have been given appellants by appellee Susan F. McKinney. The defendants failing to give bond under the statute, appellants gave bond, and took possession of the goods under the writ. The answers pleaded were (1) *non est factum* by Susan F. McKinney, mortgagor; (2) general denial by all defendants; (3) material alteration by inserting in the mortgage after its execution, by the plaintiffs, their agent or attorney, the words “in my storeroom in Bedford;” (4) by defendants other than the mortgagor, that the mortgagor was indebted to them, and the mortgage was given to plaintiffs in pursuance of a fraudulent conspiracy between them and the mortgagor to defeat the codefendants in the collection of their debt. To this the plaintiffs replied (1) a general denial; and (2) the payment of their indebtedness. The jury returned the following verdict: “We, the jury, find for the defendants; that the property seized under the writ of replevin herein, and delivered to the plaintiffs, be returned to the defendants.” On this verdict the court rendered judgment that the plaintiffs take nothing by this action; that the defendants are the owners and entitled to the immediate possession of the property described and taken under the writ of replevin, and for costs.

But three questions arise on this appeal, viz., the sufficiency of the verdict, the correctness of certain instructions, and the rulings on the admission of evidence.

It is claimed that the verdict is insufficient because it fails to find the value of the goods taken. Section 558 Burns 1901 provides: “In actions for the recovery of

specific personal property, the jury must assess the value of the property, as also the damages for the taking or detention, whenever, by their verdict, there will be a judgment for the recovery or return of the property."

In *Baldwin v. Burrows*, 95 Ind. 81, which was an action of replevin, the verdict was general for the defendant. The plaintiff's motion for a *venire de novo* because of the general verdict was overruled. In passing upon the question the Supreme Court say: "A verdict for the defendant was equivalent to a verdict that the plaintiffs were not the owners and entitled to the possession of the property. If the property had been taken by the plaintiffs under the writ, this would have entitled the defendant to a verdict for the return of the property and damages for the taking of it; if it had not been so taken, no return could have been awarded or damages assessed for taking. But if the defendant was entitled to a sufficient verdict to warrant a judgment for the return of the property and for damages for taking it, but failed to obtain such a verdict, how can that harm the plaintiffs? The plaintiffs can not complain of an error committed in their favor, and that can not possibly do them any injury. There was no error against the plaintiffs in overruling the motion for a *venire de novo*." The foregoing case is decisive of the sufficiency of the verdict.

Instruction five given to the jury at the request of appellee was excepted to. In effect it said that the execution of the mortgage in question consisted in its being signed and delivered; that if the defendant Susan F. McKinney signed the mortgage in suit before the words "in my storeroom at Bedford" were added to it, and delivered it in that condition to the attorney of the plaintiffs, then that would be the execution of the mortgage as it then existed, "but that if afterwards the attorney of plaintiffs altered it by inserting the words 'in my storeroom in Bedford,' then before such instrument could be of any binding effect

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upon her, the mortgage would have to be delivered by her to the plaintiffs or their attorney with the words added, for until the actual delivery of the instrument in its present form it would be a nullity." The objection made to the instruction is that it destroys any act or power of ratification. Standing alone, the instruction might be misleading. In other instructions the court charged that if any changes were made in the mortgage with the consent of the mortgagor, it was the instrument of such person; that if the words "in my storeroom in Bedford" were written in said mortgage by John D. Alexander after it had been signed by Mrs. McKinney, and she gave her consent for him to insert such words, then it would be her act, and she could not defend against such mortgage on that account.

They were further instructed that, if the words were inserted with her knowledge and consent after its execution, it would be valid, but if they were inserted after the execution, without her knowledge, by plaintiffs or their agent or attorney, it would be invalidated, unless the mortgagor subsequently ratified the same. Other instructions given made it clear that the mortgagor had the power of ratification. We can not conclude that the instruction complained of misled the jury.

Instruction nine, given at the request of the defendant, is as follows: "If in this case you should find that John D. Alexander was the attorney of the plaintiffs, and acting for them in the preparation of the mortgage sued on, then I instruct you that the knowledge of John D. Alexander as to any alteration in the mortgage would, in law, be knowledge to the plaintiffs themselves." It is urged that by this charge all of said Alexander's knowledge obtained after the execution of the mortgage was attributed to plaintiffs; that they could be held only to possess the knowledge he acquired in the performance of the duties for which he was employed; that subsequently acquired

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knowledge would not relate back to the transaction. If we concede, for the sake of the argument, the claim of appellants, the error would not warrant the reversal of the judgment, in view of the fact that the jury, in answer to the interrogatories, found that the words "in my storeroom in Bedford" were not in the mortgage when Susan F. McKinney signed and acknowledged it, that they were afterwards inserted by said Alexander without her consent, and that at the time he wrote them he was the attorney of the plaintiffs.

Appellee Susan F. McKinney testified that she had been forced to sign the mortgage she delivered, by one Croxall, plaintiffs' agent. This statement appellants sought to contradict by witness Croxall. To the refusal of the court to permit this testimony appellants excepted. Appellee admitted having executed the mortgage as it was before its alteration. It was only with reference to the instrument as delivered to Croxall that she made the statement that she was forced to do what she did. It was upon a matter not material, and the court committed no error. Upon cross-examination of the same party, she was asked if it was not her intention at the time she executed the mortgage to mortgage the goods in her storeroom. The court sustained an objection to the question. Her intention was material. If she intended to mortgage the goods in her storeroom to appellants, and the mortgage omitted the words locating them, the presumption would be that the omission was by mistake. Mr. Alexander testified that he had drawn up the mortgage; that after leaving the mortgage at the office of the recorder for record he discovered the omission; that he explained the omission to appellee McKinney, and procured her consent to their insertion, and that pursuant thereto he wrote them in the instrument. Appellee denied giving her consent thereto. The jury found specially that the alteration complained of was made without her knowledge or consent. In the former appeal

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of this case (*McKinney v. Cabell*, 24 Ind. App. 676) the alteration alleged was held to be a material one. An answer to the question might have affected the weight the jury gave her denial of her consent to the alteration made. The question was material. It also went to her credibility.

The judgment is reversed, with instructions to sustain appellants' motion for a new trial.

HERBERT v. RUPERTUS ET AL.

[No. 4,468. Filed October 30, 1903.]

HUSBAND AND WIFE.—*Mortgage of Wife's Land for Living Expenses.*—

Husband's Debt.—A husband and wife executed a note for money which was used in part to pay living expenses and in part to pay the expenses of the wife's last illness, she being sick at the time. They also executed a mortgage on the wife's real estate to secure the note. After the wife's death, and by agreement of all the parties concerned, the administrator of the deceased wife's estate sold the said real estate to pay the mortgage lien. *Held*, that the one-third of the fund derived from the sale which under the statute descended to the husband should be first applied to the satisfaction of the mortgage debt.

From Vanderburgh Circuit Court; *A. C. Hawkins*, Judge.

Suit by Walton N. Wheeler, administrator with will annexed of the estate of Anna N. Slinghart, deceased, against Peter Herbert and others to sell real estate to pay debts. From a judgment for plaintiff, defendant Herbert appeals. *Affirmed*.

W. W. Ireland and *William Reister*, for appellant.

S. R. Hornbrook and *W. M. Wheeler*, for appellees.

ROBY, J.—The special finding herein shows the following facts: Appellee Wheeler is the administrator with the will annexed of Anna M. Slinghart, who departed this life August 15, 1901, testate, the owner of the west half of lot six, block eighty-one, in the city of Evansville. Fred L. Slinghart was the husband of the deceased, and they

were living together at the time of her death. Within ninety days after the will of said Anna M. was admitted to probate, the husband duly elected to take under the law. On October 25, 1901, he executed a warranty deed to appellant for the one-third part of the said real estate. Thereafter said administrator filed his petition to sell said real estate, making appellant a party, and it was agreed by all the parties to the proceeding that the sale be made, and that the right of each one to assert his claim to any portion of the proceeds be postponed until such sale was made and the proceeds thereof in the hands of the administrator. Thereafter the property was sold for \$810, sale approved, and cause continued in order to adjudicate the rights of the respective parties to the fund. There was a mortgage lien against said real estate of \$371.25, such mortgage having been executed by Anna M. and Fred Slinghart, who were husband and wife at the time. Two-thirds of the proceeds of the sale is sufficient to pay said mortgage. There are no claims filed, contracted before the marriage of said Anna M., who had no other property. The real estate was occupied by her and her husband as a home. The mortgage was executed to secure a loan of money which was used to pay living expenses and the expenses of decedent's last illness, she being then sick, and other incidental expenses, all of which were for family necessities, the husband receiving the benefit of said loan by the payment of such debts and expenses. The notes given therefor were not signed by the husband. The mortgage contained a clause as follows: "And the mortgagor expressly agrees to pay the sum of money above secured," etc. Such mortgage was duly recorded eight months prior to the time that the deed was executed to appellant, who bought with full knowledge thereof. Claims against said estate are pending to the amount of \$275, and Fred Slinghart is an insolvent nonresident.

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Upon these facts the court stated as conclusions of law that, as between the parties, the mortgage debt was the debt of the husband; that the real estate appellant acquired from the husband was liable for its proportion of the mortgage debt. From a judgment in accordance with such conclusions the appeal is taken.

Upon the death of the wife testate or intestate one-third of her real estate descended to the husband, subject to its proportion of her debts contracted before marriage. §2642 Burns 1901. The estate thus acquired by him is not subject to the payment of the general debts of the deceased wife. *Kemph v. Belknap*, 15 Ind. App. 77; *Roach v. White*, 94 Ind. 510. The right conferred by the statute is absolute, except when it has been waived by agreement, or when the husband has estopped himself from claiming it. *Roach v. White, supra*; *O'Harra v. Stone*, 48 Ind. 417. The husband who by joining with the wife enables her to mortgage her estate, as she could not otherwise do, said mortgage containing an agreement to pay the debt secured, is estopped from denying the jurisdiction of the court to sell all the land thus mortgaged. *Pearson v. Kepner*, 29 Ind. App. 92. The husband owes to the wife the duty of supporting and maintaining her. *Arnold v. Brandt*, 16 Ind. 169; *Nelson v. Spaulding*, 11 Ind. App. 453.

Distribution of the fund, under the issue, depends upon the equities of the various claimants. Appellant is entitled to the husband's share. The appellee administrator is the representative of the wife. The relation of these two to the debt secured by the mortgage is therefore open to inquiry. *Johnson v. Jouchert*, 124 Ind. 105, 8 L. R. A. 795. Suretyship is a fact collateral to the main contract. The rights and liabilities sustained by the husband and wife to the debt do not depend upon the form in which it was evidenced.

When two persons are jointly liable for the same debt, and as between themselves the debt is the debt of one of them, that one is regarded as principal and the other as surety. The inquiry is, who received the consideration, and who, according to the arrangements actually made, ought to pay the debt? *Lackey v. Boruff*, 152 Ind. 371, 376; *Sefton v. Hargett*, 113 Ind. 592; *Porter v. Waltz*, 108 Ind. 40.

The special finding shows that the husband received the benefit of the loan to secure which the mortgage was executed, and he expressly agreed to pay the "sum of money so secured." As between him and the wife, compelled to mortgage her home to pay debts and expenses for which it was the duty of the husband to provide, it can not be doubted that the equity was with her, and consequently is with her administrator. That portion of the fund derived from the sale of the real estate descending to the husband should have been first applied to the satisfaction of the mortgage debt. *Pomeroy, Eq. Jurisp.* (2d ed.), 1417.

The order of distribution was more favorable to appellant than the facts warrant. Judgment is affirmed.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY v. BEERY ET AL.

[No. 4,516. Filed November 3, 1903.]

PLEADING.—*Demurrer.*—*Form.*—A demurrer to a complaint "for the reason that said complaint does not state a cause of action," though not in the form of the statute, is sufficient to question the complaint under the fifth statutory cause. *p. 557.*

NEGLIGENCE.—*Carriers.*—*Complaint.*—*Proximate Cause.*—*Railroads.*—A complaint against a railroad company for damages for injury to a car load of horses alleging that it was the duty of defendant to place the car at the chute at the stock-yards upon arrival at its destination so that the stock might be unloaded, and that defendant not only failed so to place the car, but refused to do so when requested, and that, disregarding its duty and plaintiffs' request, the car was placed by defendant among other cars, away from

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the chute, and in a position where it was impossible to unload the horses, leaving the car and horses so situated until the next day, and during the time the horses were in defendant's charge, and while standing on the side-track they became and were injured, to such an extent that when they were unloaded from the car two of the horses died, and others were crippled, while showing negligence, does not show that the negligence charged was the proximate cause of the injury. pp. 558-561.

From Allen Circuit Court; *Edward O'Rourke*, Judge.

Action by Daniel W. Beery and another against the Toledo, St. Louis & Western Railroad Company. From a judgment for plaintiffs, defendant appeals. *Reversed*.

C. G. Guenther, Braden Clark, Clarence Brown and *C. A. Schmetau*, for appellant.

Shaffer Peterson, Wilmer Leonard and *Elmer Leonard*, for appellees.

ROBINSON, C. J.—Suit by appellees for damages for injury to a car load of horses. A demurrer to the complaint "for the reason that said complaint does not state a cause of action" was overruled. This ruling is the first error assigned.

It is suggested by counsel for appellees that the demurrer is not in form as the statute requires. But we think it sufficient to question the complaint under the fifth statutory cause for demurrer. The form used could not reasonably be said to come within any of the other statutory causes for a demurrer. Demurrers have been held sufficient in form where a demurrer to several paragraphs of answer was on the ground that neither paragraph "states facts sufficient" (*Ross v. Menefee*, 125 Ind. 432); and to a complaint that it "does not state facts sufficient" (*Petty v. Board, etc.*, 70 Ind. 290); and that the complaint "does not state facts enough to entitle the plaintiff to relief" (*Pace v. Oppenheim*, 12 Ind. 533); and that the complaint "does not contain and set forth sufficient facts to enable the plaintiffs to sustain said action" (*Stanley v. Peeples*, 13 Ind. 232). Demurrers on the ground that the com-

plaint is "not good and sufficient in law" (*Porter v. Wilson*, 35 Ind. 348); and that the complaint "does not state facts sufficient to constitute a complaint" (*Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121); and that "the petition does not state facts sufficient to constitute a good and sufficient petition" (*Grubbs v. King*, 117 Ind. 243)—were held insufficient in form to present any question. The statute requires that the complaint shall contain "a statement of the facts constituting the cause of action." The cause of action between the parties consists of a statement of the facts, and when the demurrer says that the complaint does not state a cause of action, the necessary implication is, under this statutory designation of what constitutes the cause of action, that the complaint does not state sufficient facts.

The complaint avers that on July 24, 1901, appellees shipped thirty horses over appellant's road, with directions to appellant to deliver to themselves at Russiaville, a town on appellant's road; that the shipment was made in time so that the horses could be delivered at such station before the morning of July 25, 1901, at which date appellees had advertised a sale of the horses; that appellant accepted the horses, which were then in good condition—the freight charges having been paid in advance—and placed the car in one of its freight-trains which reached Russiaville about 11 o'clock of the night of July 24, 1901; that at that time appellees had at the place an experienced representative who understood the business of unloading horses from cars into stock-yards, at which place appellant had a stock-yard with a chute made for the purpose of receiving stock from the cars and transferring them to the stock-yards; that it was appellant's duty to place the car at and in connection with the chute; that a representative of appellees at the arrival of the train requested appellant's employes in charge of the train properly to set the car at the chute so that the same might be unloaded; that this the employes

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refused to do, but set off the car among a large number of other freight-cars on a side-track away from the stock-yards and away from the chute, and in such condition that it was impossible for appellees to unload, leaving the car and horses so situated until about the hour of 10 o'clock the following day, July 25, 1901, at which time appellant sent another engine, and placed the car at the chute, and unloaded them from the car; that "during the time the said car load of horses were in the defendant's charge, and while standing on her side-track at Russiaville, they became and were injured to such an extent that when they were unloaded from said car by the defendant two shortly thereafter died, others were crippled, maimed, and bruised to such an extent that they were worthless, so much so that the entire car load were rendered useless and worthless to plaintiffs, and when they were requested by defendant's agents and employes to receive said horses they refused them, and left them in the possession of the defendant company; that at the time this defendant received said car load of horses for shipment they were reasonably worth \$40 per head, making a total value of \$1,200; that plaintiffs requested the defendant company to adjust said loss, which they refused to do; that said request was made of defendant before plaintiffs refused to receive said horses from the defendant. The injury to plaintiffs' horses was caused wholly on account of the negligence of the defendant, and without any fault or negligence on the part of the plaintiffs. By reason of the fault of the defendant, plaintiffs were damaged \$1,200, for which they demand judgment in the sum of \$1,200, and all other proper relief."

This is an action in tort. It is predicated upon appellant's negligence. It is argued against the sufficiency of the complaint that it fails to charge negligence, and that if it does charge negligence it fails to connect such negligence with the injuries complained of. It is averred that it was appellant's duty to place the car at the chute at the stock-

yards upon arrival at its destination so that the stock might be unloaded. It is also averred that appellant not only failed so to place the car, but refused to do so when requested, and that, disregarding its duty and appellees' request, the car was placed by appellant among other cars away from the chute and in a position where it was impossible to unload the horses. That such a duty rested upon appellant is admitted for the purpose of the demurrer. If it was in fact charged with such a duty, its failure to perform it would be no less negligent than its failure to perform a statutory duty. The only difference in the two instances is that in the former the duty must be proved, while in the latter it is fixed by statute. The omission to perform the duty charged was negligence.

But the complaint fails to show this imputed negligence was the proximate cause of the injury. It is simply charged that during the time the car load of horses was in appellant's charge, and while standing on the side-track, they became and were injured. Whether they were injured because of having been left on the side-track, or whether they were injured from some cause with which appellant had nothing to do, is left to conjecture. No facts are averred to show whether injury would necessarily and naturally result to horses left as these were, and that appellant knew such to be the fact. No facts are averred which to a certainty raise the presumption that the injury was the result of the negligence charged. It is not charged that the horses were injured by reason of having been left as they were. So far as informed by the complaint, the injury might have occurred just as it did occur had there been no omission of duty on appellant's part. The pleading shows no connection between the negligence charged and the injury in the way of cause and effect. The injury is averred, but the complaint does not aver what caused it, nor does it aver facts from which it can be said that the injury complained of must necessarily have occurred from the negli-

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gent act charged. *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Pittsburgh, etc., R. Co. v. Conn*, 104 Ind. 64; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Harris v. Board, etc.*, 121 Ind. 299; *Evansville, etc., R. Co. v. Krapf*, 143 Ind. 647; *Baltimore, etc., R. Co. v. Young*, 146 Ind. 374; *Chicago, etc., R. Co. v. Thomas*, 147 Ind. 35; *Lake Erie, etc., R. Co. v. Mikesell*, 23 Ind. App. 395; *South Chicago City R. Co. v. Moltrum*, 26 Ind. App. 550; *Peerless Stone Co. v. Wray*, 10 Ind. App. 324; *Ohio, etc., R. Co. v. Engrer*, 4 Ind. App. 261. See, also, *City of Greencastle v. Martin*, 74 Ind. 449, 39 Am. Rep. 93; *Pennsylvania Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188; *Corporation of Bluffton v. Mathews*, 92 Ind. 213.

The averment at the close of the pleading that "the injury to plaintiffs' horses was caused wholly on account of the negligence of the defendant, and without any fault or negligence on the part of the plaintiffs," does not make the complaint sufficient, as no act or omission is mentioned, and no reference is made to any act or omission or negligence before mentioned. *South Chicago City R. Co. v. Moltrum, supra*; *Ohio, etc., R. Co. v. Engrer, supra*.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

CALLICOTT v. ALLEN.

[No. 4,438. Filed April 22, 1903. Rehearing denied June 25, 1903. Transfer denied November 3, 1903.]

CONTRACTS.—*When Void as Against Public Policy.*—Contracts are not held void as against public policy, unless the contract itself requires the doing of something affecting the public good, or the consideration is immoral or hurtful, or is forbidden by statute. p. 569.

MORTGAGES.—*Taken in Name of Nonresident to Avoid Taxation.*—*Validity.*—*Public Policy.*—A mortgage executed in proper form and duly recorded is not void on the ground of public policy because taken in the name of a nonresident by whom it was assigned to the real owner, and the assignment withheld from record, in order to avoid the payment of taxes. pp. 563-570.

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From the Superior Court of Vanderburgh County;
J. H. Foster, Judge.

Suit by Harrison Callicott against Lucy S. Allen.
From a judgment for defendant, plaintiff appeals. *Affirmed.*

C. L. Wedding, for appellant.

J. T. Walker, for appellee.

WILEY, J.—The single question presented for decision by this appeal is the sufficiency of appellant's complaint, to which a demurrer for want of facts was sustained.

The complaint avers the following material facts: That one Charles Rucker on May 8, 1898, was the owner of certain real estate in the city of Evansville, Indiana, and that on that day, his wife joining him, he executed to one Charles D. Briggs, of the State of Illinois, a mortgage on the real estate, to secure the payment of one principal note for \$1,200, due in three years from date, and certain interest notes maturing every six months thereafter; that such mortgage was duly recorded in Vanderburgh county; that appellee was, when this action was commenced, and for ten years prior thereto had been, a resident of said Vanderburgh county, and subject to taxation therein; that said sum of money represented by said mortgage and notes was the money of appellee, and that said mortgage and notes were executed and taken in the name of said Briggs, for the sole purpose of avoiding taxation on the same in the name of the appellee, and that after the execution of said mortgage the original mortgagor conveyed to appellant the real estate described therein, and that he is still the owner thereof; that after the said mortgage was recorded the said Briggs assigned the same, together with the notes, to appellee, who has been ever since and is still the owner thereof; that said assignment was purposely and corruptly kept off the records of said county in the furtherance of the scheme of appellee to avoid taxation; and that appellee

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has thereby escaped paying taxes thereon. It is averred that by reason of such facts said mortgage is fraudulent and void and against public policy, that the same is a cloud upon the title to appellant's real estate, and that it should be canceled and held for naught.

The question for decision rests upon a correct answer to the following inquiry: Is the mortgage which appellant seeks to have canceled fraudulent and void because it was taken, recorded, and assigned for the purpose, on the part of the appellee, to avoid and escape taxation? If this inquiry is answered in the affirmative, it must be upon the sole ground that the transaction, as disclosed by the complaint, is against public policy.

Appellant's grantor, the original mortgagor, was in no way injured, for he received all he contracted for. The mortgage which he gave was duly recorded, and such record was notice to the world. It follows that when appellant took the title to the property, he took it with notice of the mortgage and subject to its lien. It does not appear from the complaint that he assumed its payment as part of the consideration, but the law lays on the property the burden of the mortgage, and the rule of *caveat emptor* applies. Appellant, therefore, in his individual capacity, was in nowise injured by the alleged fraud, for he is in the position of his grantor, and received all that he contracted for. The fraud of which he complains has not infringed his individual rights, nor affected his individual legal obligations. As between all the parties to the transaction and their privies, no fraud was perpetrated, for one received all the money for which he contracted and the other all the security. There was a valuable consideration moving from one to the other, and no fraudulent misrepresentation is charged.

Will a court of equity declare void the mortgage described in the complaint on the ground that it was executed and assigned in the manner disclosed for the purpose of

avoiding and escaping taxation? Fraud vitiates all contracts, but this rule should be applied to contracts superinduced by fraud on the part of one of the contracting parties, which has affected his individual rights. To illustrate: A and B enter into a contract, with which they are entirely satisfied. Neither of them is overreached, and they each get all the consideration for which they contracted. In such contract, however, A, with sinister motives, and with fraudulent intent, has perpetrated a fraud on C. Can B defend against his contract on the ground that A has defrauded C? There can be but one answer to this proposition, and that must be in the negative. The law will compel B to keep the covenants of his contract, and in like manner put into the hands of C the right to pursue his individual remedy against A for fraud, perpetrated upon him.

If the legal principle declared by the illustration which we have given is correct, the decision of the question presented becomes simple. Taking the facts pleaded as true—which we must for purposes of the demurrer—we find two parties entering into a contract. They both fully understood the terms of the contract, and they each received all they contracted for. The mortgagor was not misled in any way by false or fraudulent representations. The appellant now stands in the same relation to the contract that his grantor occupied, and he too received what he contracted for, and was not misled by any false or fraudulent misrepresentations on the part of the appellee. Up to this point, who has been injured in his or her individual rights? Certainly none of the parties to the transaction. The commonwealth, in its several governmental departments, is the only injured party, and it has not lost its remedy, for the law is ample in such cases to protect its rights. While the State was not a party to the contract, its rights were infringed, in that appellee, by her conduct, escaped the payment of her just proportion of taxes, which the law casts

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the purpose of defeating taxation, and that the plaintiff had, before the commencement of the suit, paid all the taxes due on the note secured by the mortgage. On appeal the judgment was reversed on the ground that the evidence showed that the mortgage was taken in the name of a third person—a nonresident—for the purpose of evading the payment of taxes, and that made the contract illegal and void. The Kansas case, *supra*, was where a mortgagee residing in the state of Kansas assigned the mortgage to his father, who lived in another state, to secure the payment of \$450 and interest for prior borrowed money, but really for the purpose of evading the payment of taxes. In a suit by the father to recover on the note and mortgage it was held that the mortgagee, on account of his acts in evading the payment of taxes, and thereby defrauding the revenues of the state, could not recover in the name of the father or otherwise on any part of the note and mortgage belonging to him. In the latter case the Nevada case, *supra*, is cited as authority and followed. When *Drexler v. Tyrrell* was decided, the supreme court of Nevada was composed of three judges, one of whom dissented. These two cases are the leading ones upon the question involved, and the only ones which have come to our attention, sustaining the theory of appellant.

In 55 Central Law Journal, at pages 121, 201, and 261, are three articles by the editor approving these cases. The two cases cited are not authority in this State, and we do not think the decisions rest upon sound reason or good law. They have been repudiated by other courts of high standing, and strongly criticised by an able text-writer.

In the case of *Crowns v. Forest Land Co.*, 99 Wis. 103, 74 N. W. 546, it was held that an answer in suit to foreclose a mortgage, alleging that the note and mortgage were taken in the name of the plaintiff for the purpose of enabling the real owner to evade taxation on account thereof,

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presents no ground for a discharge of the mortgagor from his just debt. In the course of the opinion commenting on the *Drexler v. Tyrrell* case, *supra*, the court said: "*Drexler v. Tyrrell*, 15 Nev. 114, was cited to support that portion of the answer wherein it is alleged that the note and mortgage were taken in the name of Crowns for the purpose of concealing the same from the assessor, and thus escaping taxation. It is unnecessary to discuss this case. It is based upon the peculiar revenue laws of that state, which are referred to in the opinion, and has never been recognized as authority outside of its boundaries, so far as we have been able to discover. On the contrary, it has been severely and justly criticised in other jurisdictions, and is regarded as wrong in principle. Jones, Mortgages, §619. It is not charged that the note and mortgage in suit were, in themselves, illegal or contravened the policy of the law. The contract between the parties was one they were not prohibited in making, and, so far as anything appears in the answer, the mortgagor received full and complete consideration for it. The only taint in the transaction is the alleged violation of the revenue laws. The law of this state provides that taxes shall be levied upon all the property in this state except such as is exempt, R. S. 1878, §1034. Personal property shall be construed to mean and include, among other things, all debts due from solvent debtors, whether on account, note, contract, bond, mortgage, or other security, or whether such debts are due or to become due; Id. §1036. The taxpayer may be examined under oath, and, if he makes a false statement of his property, he is subject to a penalty of \$10 on every \$100 withheld from the knowledge of the assessor. Id. §1056; S. & B. Ann. Stats. §1056a. When the revenue laws provide ample punishment for the evasion by taxpayers of their just dues, it would seem a monstrous injustice to permit a mortgagor to defeat the payment of his debt by bringing any such issue

into a suit brought to foreclose his mortgage. The alleged turpitude of the mortgagee furnishes no ground for the discharge of the mortgagor from the payment of his just debt."

The case of *Nichols v. Weed Sewing Mach. Co.*, 27 Hun (N. Y.) 200, affirmed in the 97 N. Y. 650, was a case where one of the defenses interposed to the foreclosure of a mortgage was that it was against public policy, as the facts alleged showed that an attempt had been made to escape taxation. It was held that the defense could not prevail. In referring to the Nevada case, *supra*, the court said: "We have examined the case of *Drexler v. Tyrrell*, 15 Nev. 114, cited by defendant. As the case is not authoritative in this state, it is sufficient to say that we have considered the opinion of the majority of the court and the cases cited to sustain it; and we do not think it correct, or sustained by the citations. As we think, the opinion fails to appreciate that there is no illegality in the contract of the loan; and that the question is only whether one who has borrowed money shall repay it."

In a note following a reference to the case of *Drexler v. Tyrrell*, *supra*, in Jones, Mortgages (5th ed.), §619, the author severely criticised the rule there declared, in the following language: "But the cases cited in support of the decision are cases in which the consideration of the contract, as between the parties themselves, was either illegal or contravened the policy of the law. In the case before the court, however, there was nothing illegal in the contract as between the parties. It was a contract they were not prohibited from making, and there was a full and complete consideration for it. The only taint in the transaction was the intended fraud upon the revenue laws of the state. For this intended fraud the court upheld the mortgagor in refusing payment of the mortgage; they upheld him in a monstrous injustice, when the revenue laws of the state provided proper and ample punishment for an evasion of

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them by criminal prosecution. The decision is regarded as wrong in principle.”

By a reference to Jones, *Mortgages* (5th ed.), §618, wherein the author discusses the question of void mortgages, because they are repugnant to public policy, etc., it is clearly shown that the contract itself must be tainted with some illegal or wrongful act, and affecting the consideration.

A careful consideration of the authorities leads us to the conclusion that courts do not hold contracts void as against public policy, unless the contract itself requires the doing of something affecting the public good, or the consideration is immoral or hurtful, or that it is forbidden by statute. See Greenhood, *Public Policy*, 1; Story, *Contracts* (5th ed.), §§674, 675; *Kellogg v. Larkin*, 3 Pin. (Wis.) 123, 56 Am. Dec. 164; Beach, *Contracts*, §1415; Daniel, *Neg. Inst.* (4th ed.) §196; 1 Wiltsie, *Mortgage Foreclosures*, §342.

The case of *Stilwell v. Corwin*, 55 Ind. 433, 23 Am. Rep. 672, was an action by the appellee as administrator of the estate of Makepeace, deceased. One paragraph of the complaint was based upon the following writing: “Received of Allen Makepeace, for safekeeping, \$14,500, in seven and three-tenths United States bonds; said bonds to be returned to said Makepeace, at any time called for. Interest on said bonds due August 15 and February 15. Anderson, Indiana, December 28, 1865. [Signed] J. G. & T. N. Stilwell.” The two Stilwells were proprietors of a private bank, and Makepeace was a depositor therein. In an action to recover the bonds so deposited, one of the defenses interposed rested upon the facts, pleaded by way of answer, that Makepeace had on deposit in the Stilwell bank \$14,500 in currency, which was subject to taxation, and that, to enable him to evade paying taxes thereon for the ensuing year, it was agreed between the parties that the certifi-

cate of deposit for said sum of \$14,500 should be destroyed, and that the bank should be absolved from liability by reason of said deposit, and in lieu thereof they should execute the instrument sued on, which would not be subject to taxation; that, pursuant to said fraudulent scheme, said Makepeace did not list said \$14,500 for taxation, and did thereby fraudulently and corruptly avoid the payment of taxes thereon. It was urged that the agreement set out in the answer was fraudulent and void, as being against public policy. In deciding the case the court held that the answer was not a bar, and said: "The allegations in the first paragraph of answer amount to no more than that Makepeace fraudulently refused to list his money, on deposit * * * and thereby fraudulently avoided paying the tax thereon for that year. These facts constitute no answer to the obligation against the Stilwells to deliver United States bonds to Makepeace, according to the terms of the written instrument set out in the complaint, even though they assisted him in the fraud, as alleged."

Counsel for appellant has submitted an able argument, supported by many authorities, to the effect that courts will not enforce contracts that are tainted with fraud or that are repugnant to public policy. We fully agree both with his argument and the rule declared by the authorities cited, but he has fallen into the error of assuming that the contract under which he seeks relief comes within the rule. The intention of the appellee to avoid the payment of taxes in the manner alleged in the complaint did not enter into the contract, and was not a part of the consideration. The contract, in itself, is not fraudulent, is not against public policy, and is not prohibited by statute.

As appellant has not been injured, he has no remedy to invoke, nor wrong to right, and the complaint does not state facts that entitle him to any relief. Judgment affirmed.

Haugh v. Smelser.

HAUGH ET AL. v. SMELSER.

[No. 4,275. Filed January 27, 1903. Rehearing denied February 27, 1903. Transfer denied June 24, 1903. Petition for written opinion denied November 4, 1903.]

DESCENT AND DISTRIBUTION.—*Husband and Wife.*—When all of Husband's Property Descends to Wife.—Where a man dies intestate and childless, the owner of real estate, leaving a widow, and without father or mother surviving, but brothers and sisters or their descendants, the widow takes the entire estate under §2651 Burns 1901.

From Rush Circuit Court; *Douglas Morris*, Judge.

Partition proceeding by Mary H. Haugh and others against Maria P. Smelser and others. From a judgment for defendants on demurrer to complaint, the plaintiffs and all defendants, except Maria P. Smelser, appeal. *Affirmed.*

E. P. Ferris, W. W. Spencer, F. J. Hall and E. W. Spencer, for appellants.

B. F. Miller and Reuben Conner, for appellee.

WILEY, J.—Jesse W. Smelser died intestate the owner of real estate in Rush county of the value of \$30,000. He left surviving him the appellee Maria P. Smelser, his widow, who was a third wife. He died childless and neither his father nor mother survived him. The appellants—there being a large number of them—are surviving brothers and sisters or descendants of brothers and sisters of the said decedent. A number of the appellants brought an action against Maria P. Smelser, as widow, and others for partition of the real estate owned by the decedent at his death, upon the theory that the appellee was entitled to the undivided one-third of the real estate as widow, and that the plaintiffs below and all the defendants except Maria P. were entitled to have set off to them the undivided two-thirds as the brothers and sisters and their de-

scendants of said Jesse. A demurrer by appellee for want of facts was sustained to the complaint, and the only question presented by this appeal is the correctness of that ruling. All the plaintiffs and all the defendants below except Maria P. Smelser are joined as appellants.

It is not necessary to set out the complaint, for the statement above fully presents the question for decision, and that question is this: Where a husband dies intestate and childless, the owner of real estate, leaving a widow, and without father or mother surviving, but brothers and sisters, or their descendants, surviving, does the widow take the entire estate? This question is answered by the statute and a long line of decisions in this State. Section 2651 Burns 1901 is as follows: "If a husband or wife die intestate, leaving no child and no father or mother, the whole of his or her property, real and personal, shall go to the survivor." This statute has been construed by the Supreme Court in many cases, and it has uniformly been held that under it, where a wife or husband die intestate, leaving no child, and no father or mother, the whole of the property left goes to the survivor. *Armstrong v. Berreman*, 13 Ind. 422; *Leard v. Leard*, 30 Ind. 171; *Nebeker v. Rhoads*, 30 Ind. 330; *DeMoss v. Newton*, 31 Ind. 219; *Lindsay v. Lindsay*, 47 Ind. 283; *Langlois v. Langlois*, 48 Ind. 60. This statute and these decisions, under the facts averred in the complaint, vest the title to the real estate in question in appellee. The law, as thus declared for so many years, has become a rule of property in this State, and, if it is unjust or inequitable, relief should be sought through the lawmaking power, and not the courts. There can be but one construction placed upon the plain language of the statute.

Judgment affirmed.

Haugh v. Smelser.

ON PETITION FOR REHEARING.

WILEY, J.—Appellants have petitioned for a rehearing upon the following grounds: “(1) In holding that under our law of descent, and the decisions of our courts on the facts averred in the complaint, and the statutes relating thereto, the title to the real estate in question vests in the appellee; (2) that in this case it was the duty of the court to take judicial notice of the law of descent in Indiana, and the changes therein, if any, by the legislature of Indiana, with the construction of the higher courts thereon, which have been entirely ignored, and have not been considered or referred to in disposing of this important case.”

While the second ground stated in the petition does not present any question for consideration, we will consider the petition as a whole, for the reason that it is charged that the court did not consider or refer to certain questions presented by the record.

The single question in this appeal, as stated in the opinion, is the sufficiency of the complaint, which involves the relative rights of the appellants and appellee, to inherit from Jesse W. Smelser, deceased. Appellants base their right to share in the real estate of the deceased upon the following statutes: “If there be neither father nor mother, the brothers and sisters of the intestate living, and the descendants of such as are dead, shall take the inheritance as tenants in common.” §2625 Burns 1901. “If a husband die testate or intestate, leaving a widow, one-third of his real estate, shall descend to her in fee simple, free from all demands of creditors.” §2640 Burns 1901. Both of the above provisions of the statute were parts of the law of descent as enacted by the legislature of 1852. Section 2651 Burns 1901, which is quoted in the original opinion, and upon which it was held that the appellee took the entire estate, was also a part of the act of 1852. By that pro-

avoiding and escaping taxation? Fraud vitiates all contracts, but this rule should be applied to contracts superinduced by fraud on the part of one of the contracting parties, which has affected his individual rights. To illustrate: A and B enter into a contract, with which they are entirely satisfied. Neither of them is overreached, and they each get all the consideration for which they contracted. In such contract, however, A, with sinister motives, and with fraudulent intent, has perpetrated a fraud on C. Can B defend against his contract on the ground that A has defrauded C? There can be but one answer to this proposition, and that must be in the negative. The law will compel B to keep the covenants of his contract, and in like manner put into the hands of C the right to pursue his individual remedy against A for fraud, perpetrated upon him.

If the legal principle declared by the illustration which we have given is correct, the decision of the question presented becomes simple. Taking the facts pleaded as true—which we must for purposes of the demurrer—we find two parties entering into a contract. They both fully understood the terms of the contract, and they each received all they contracted for. The mortgagor was not misled in any way by false or fraudulent representations. The appellant now stands in the same relation to the contract that his grantor occupied, and he too received what he contracted for, and was not misled by any false or fraudulent misrepresentations on the part of the appellee. Up to this point, who has been injured in his or her individual rights? Certainly none of the parties to the transaction. The commonwealth, in its several governmental departments, is the only injured party, and it has not lost its remedy, for the law is ample in such cases to protect its rights. While the State was not a party to the contract, its rights were infringed, in that appellee, by her conduct, escaped the payment of her just proportion of taxes, which the law casts

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upon her property. It is a maxim of law that there is no wrong without a corresponding remedy. In such cases who can enforce the remedy? Evidently, the wronged or injured party. If appellant can succeed in having the mortgage canceled will his injury thereby be avenged? Not his, for we have seen that he has none to avenge. Should we hold that he was entitled to have it canceled, the State would have additional injury thrust upon it, for it would be deprived of adequate assets out of which it could collect the taxes, which can, under the law, be assessed, for the mortgage is chattel, and subject to sale. These considerations lead us to the conclusion that, under the facts pleaded, the State occupies the position of C in the illustration given above. Appellant is in the attitude of seeking a court of equity to cancel a mortgage on his property which he has not paid, and which is a just burden upon it, and which he knew was there when he took the title, solely upon the ground that appellee has attempted to defraud the State out of a just proportion of its revenue. To declare such a rule would be equivalent to saying that if the payee of a promissory note sequesters it from the taxing officers, a payor could successfully defend against its collection on the ground that he had defrauded the State by not returning it for taxation. Where a mortgage is given to secure a note, the note, and not the mortgage, is assessable for taxation.

Our attention has been called in argument to some cases bearing upon the question here presented that we will now consider. Appellant relies principally for a reversal upon the cases of *Drexler v. Tyrrell*, 15 Nev. 114 and *Sheldon v. Pruessner*, 52 Kan. 579, 35 Pac. 204. In the Nevada case the mortgagee brought an action to foreclose a mortgage. The mortgagor defended on the ground that the mortgage had been taken by a nonresident of the state, and then assigned, to avoid the payment of taxes. The trial court found as facts that the mortgage was not so taken for

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upon her property. It is a maxim of law that there is no wrong without a corresponding remedy. In such cases who can enforce the remedy? Evidently, the wronged or injured party. If appellant can succeed in having the mortgage canceled will his injury thereby be avenged? Not his, for we have seen that he has none to avenge. Should we hold that he was entitled to have it canceled, the State would have additional injury thrust upon it, for it would be deprived of adequate assets out of which it could collect the taxes, which can, under the law, be assessed, for the mortgage is chattel, and subject to sale. These considerations lead us to the conclusion that, under the facts pleaded, the State occupies the position of C in the illustration given above. Appellant is in the attitude of seeking a court of equity to cancel a mortgage on his property which he has not paid, and which is a just burden upon it, and which he knew was there when he took the title, solely upon the ground that appellee has attempted to defraud the State out of a just proportion of its revenue. To declare such a rule would be equivalent to saying that if the payee of a promissory note sequesters it from the taxing officers, a payor could successfully defend against its collection on the ground that he had defrauded the State by not returning it for taxation. Where a mortgage is given to secure a note, the note, and not the mortgage, is assessable for taxation.

Our attention has been called in argument to some cases bearing upon the question here presented that we will now consider. Appellant relies principally for a reversal upon the cases of *Drexler v. Tyrrell*, 15 Nev. 114 and *Sheldon v. Pruessner*, 52 Kan. 579, 35 Pac. 204. In the Nevada case the mortgagee brought an action to foreclose a mortgage. The mortgagor defended on the ground that the mortgage had been taken by a nonresident of the state, and then assigned, to avoid the payment of taxes. The trial court found as facts that the mortgage was not so taken for

being unable to pay the purchase money, they had reconveyed the real estate to the decedent, and he had canceled the record of the mortgage in ignorance of the existence of the judgment lien, and asking that the mortgage lien be revived as against the judgment lien, which action resulted in a decree whereby the amount of the mortgage lien was ascertained and determined at \$701.58, and declared to be prior to the judgment lien; and also that the judgment of McMahon was a lien on the real estate, but junior to the mortgage lien, and the decree fixed the amount thereof at \$587.89, and costs accrued at \$46.53, and fixed the sum of both liens at \$1,389.04 and costs; and it was further decreed that upon the payment of the amount of the mortgage lien by Brannon, guardian, he should be subrogated to the rights of the holder of the mortgage lien; that thereafter Brannon, as guardian, paid said sum, and caused a duly certified copy of the decree and the order of the court directing the sale of the real estate to pay the liens and costs to be issued by the clerk to the sheriff, who duly sold the real estate February 24, 1900, to Brannon, as guardian, for \$1,389.04, and issued to him a certificate of purchase therefor, and on April 26, 1900, the appellees "redeemed" said real estate from said sale by paying to Brannon the amount of the purchase money for which the real estate had been sold to him by the sheriff, and, in order to cut off certain other judgment liens existing on said land, and which had been rendered against Corbaley and Freese in favor of different persons, caused Brannon to assign to the appellee Krick the certificate of purchase, which he still held; that in effecting "said redemption" the appellees used and applied the sum of \$701.58, which had been so paid by Brannon in payment of the mortgage lien, and the appellees were compelled in addition thereto to pay him in money the further sum of \$687.42 to satisfy the judgment lien and costs, and thereby, it was alleged, they were damaged in the last-mentioned

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sum in consequence of the existence of the judgment lien and the breach of the covenant in said deed by which the decedent warranted the real estate against all encumbrances. After some allegations relating to expenses, there was an averment of failure and refusal of the appellants to pay; and it was alleged that the sum paid to extinguish the judgment lien was not paid by the appellees until after final settlement of the estate of the decedent, and therefore they could not present and prosecute in the court below any claim against the estate for the amount so due them; and that each of the appellants received, as heir at law of the decedent, in property, real and personal, an amount exceeding the sum so due the appellees.

A demurrer to the complaint for want of sufficient facts having been overruled, there was an answer in four paragraphs; the first a general denial. The court sustained a demurrer to the other paragraphs. The second paragraph of answer, by facts alleged therein, showed that when the appellees purchased the real estate they had constructive notice that the judgment of McMahan was a lien thereon; that long before the decease of their grantor they had actual notice of the judgment, and actual knowledge that it was a lien on the real estate, and had requested him in his lifetime to have the lien satisfied and removed; that the grantor died March 11, 1897, and on March 23, 1897, one of the appellants named was appointed and qualified as administrator of the decedent's estate, and gave notice of his appointment by publication and posting as required by law, and that such proceedings were thereafter had in the court below having jurisdiction of the administration, that April 18, 1898—more than a year after the issuance of the letters of administration and the giving of notice thereof—he filed his final report as administrator in that court, and due publication and posting of notices thereof were made by him, and on May 17, 1898, he filed in that court proof of such publication and posting, and there-

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upon the court then approved his final report and ordered distribution of the balance in his hands, according to the report, which distribution was made and reported to the court, and the report was by the court approved, and the administrator was discharged, and the estate was settled and closed. It was alleged that during all this time the appellees had actual knowledge of the judgment lien and of the pendency of the administration, and filed no claim against the estate, and filed no statement of the lien, and made no demand on the administrator for a settlement or a release of the lien, but that soon after the final settlement report was filed the appellee Krick, then and now sole owner of the real estate by deed of conveyance from his co-appellee, who the appellants claim has no interest in the cause, filed in the office of the clerk of the court below a verified complaint against the estate and administrator, setting up the breach of warranty alleged in the complaint, and demanding damages therefor, and such proceedings were had that the claim was dismissed by the court, and the appellee Krick has not taken an appeal from the judgment of dismissal, and the time for an appeal therefrom has expired; that during the pending of the claim so dismissed the claimant made no showing of fraud on the part of the administrator, or of excusable neglect on his own part for not filing the claim before the filing of the settlement report or that the claimant was insane, an infant, or absent from the State during the pendency of the administration; and that the suit at bar was not brought within two years from such final settlement. The third paragraph contained allegations to the effect that while the claim of the appellee Krick, so dismissed, was pending before the court below, he, on August 1, 1898, gave the appellants written notice to the effect that the sheriff had levied on the real estate in question by virtue of an execution on the McMahon judgment, and that the appellees intended to hold the appellants liable on the cov-

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enants of the deed for all damages the appellees might sustain; that afterward the appellee Krick, he being the sole owner of the real estate, entered into an agreement with the appellants that he, with their consent, and upon their agreement then made to pay the attorney's fees, would bring an action in the court below, and he did thereupon bring such suit, against the party claiming under the judgment and the sheriff, praying for the revival of the mortgage of Corbaley and Freese to the decedent, and for the foreclosure thereof, and the application of the proceeds thereof as a lien prior to that of the judgment, in favor of Krick, as owner by conveyance from the decedent to Krick and McIntosh and by McIntosh to Krick, that in such action the court adjudged that the mortgage be revived and declared a prior lien, and that the execution plaintiff should pay into court for Krick \$701.58, the amount due on the mortgage, after deducting rental for the premises while occupied by the appellees; that the amount found due as a prior lien to the decedent upon the mortgage lien was \$1,200, and exceeds the sum that the appellees would be entitled to recover in the action, if any, and it was reduced solely by a set-off for rents and profits while occupied by the appellees; that therefore the claim of the appellees was paid and satisfied before the commencement of this suit. It was also alleged that the appellants, pursuant to their agreement, paid the fees of the attorneys in said suit for the revival of the mortgage. This paragraph also contained averments like those of the second concerning notice of the judgment lien and concerning the final settlement of the estate. The fourth paragraph of answer, while somewhat more specific as to some of the facts, was in substance like the third paragraph.

If it be true that there was a breach of the covenant of warranty against encumbrances in the deed of conveyance from the decedent to the appellees, the right of the appellees to recover for such breach could not be affected by their

knowledge of the existence of the alleged encumbrance at the time of the conveyance, or by their knowledge thereof in the lifetime of their grantor, if the case at bar were a claim against the decedent's estate filed as such thirty days before the final settlement of the estate. The right of action is a legal claim upon an express covenant which covered all encumbrances known or unknown to the covenantees. Suit was instituted in the name of one of the appellees at the expense of the appellants, and upon their agreement, to procure a decree reviving the mortgage and declaring it still a subsisting and superior lien as against the subsequently rendered judgment; and when the amount of the mortgage lien had been paid in by the holder of the judgment lien, and he had thereby acquired the right to have the real estate sold for the satisfaction of both the liens, and he had been repaid the amount which he had so paid to acquire the superior lien, there was still left the amount of his judgment which was paid by the appellees, as was necessary for the removal of the encumbrance from the real estate; and it is for this amount only, so paid by the appellees, in addition to the amount paid and repaid on account of the mortgage lien, that they have sought and obtained relief in the case at bar.

The episode relating to the mortgage was a circumlocution which did not aid the appellants. In reviving the mortgage lien as a lien superior to the judgment lien, the amount to which the mortgage debt would have accumulated by the addition of interest was reduced by deducting therefrom the rental value of the real estate during the time it had been in the possession of the appellees, and the mortgage was treated as a lien prior and superior to the judgment lien for the amount of the balance so ascertained. Before the appellees purchased from the decedent, paying him the purchase price in full and receiving his covenant of warranty, he had released the purchase-money mortgage executed to him by his former grantees upon their recon-

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veyance of the mortgaged real estate. In reviving the mortgage lien at the suit, nominally, of the appellee Krick, he was subrogated to the right of the mortgagee, the decedent, and it was in favor of the nominal plaintiff that the lien of the mortgage was declared superior to that of the judgment. Being thus, by subrogation, treated as a mortgagee who had long been in actual possession of the mortgaged real estate, it was not improper, as against the appellants, in declaring the mortgage lien in his favor to be superior to the subsequent judgment lien, to deduct from the amount of the mortgage lien the rental value of the real estate for the period of the rightful possession of the mortgagees. As the result of the enforcement of the judgment against the real estate in the manner shown by the pleadings, in accordance with the judgment in the case conducted by the appellants in the name of one of the appellees, the latter were compelled to pay the amount of the judgment lien in order to protect the real estate from an encumbrance against which the decedent covenanted, and they were entitled to a recovery for such breach of the covenant of warranty, unless precluded by other considerations urged by the appellants, which we will now examine.

It is contended that if there was any right of action in the appellees it was a claim against the estate of the deceased warrantor, which should have been filed against the administrator of that estate before it was finally settled, and that, not having been so filed, it is barred, and may not be enforced against his heirs at law.

Counsel for the appellants direct attention to certain provisions of our statute relating to the settlement of decedents' estates. By §2465 Burns 1901, it is provided that no action shall be brought by complaint or summons against the executor or administrator for the recovery of any claim against the decedent, "but the holder thereof, whether such claim be due or not, shall file a succinct and definite statement thereof in the office of the clerk of the

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court in which the estate is pending," and that if such claim be not filed at least thirty days before final settlement of the estate, it shall be barred, except as thereafter in said statute provided in case of liabilities of heirs, devisees, and legatees. By another section of the same statute, cited by the appellants (§2470 Burns 1901), it is provided that if any person interested in such estate shall execute bond, with penalty and surety to the acceptance of a creditor whose claim is not due, for the payment thereof when it shall fall due, if it shall prove to be a legal demand, the court, on such bond being delivered and accepted, and a statement thereof subscribed by the creditor filed in the court, shall direct a minute thereof to be made on its order-book, and the estate be discharged from further liability touching it. Section 2597 Burns 1901, also referred to by the appellants, provides that the heirs, devisees, and distributees of a decedent shall be liable, to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid, who, six months prior to the final settlement of the estate was insane, an infant, or out of the State; but such suit must be brought within one year after the disability is removed; and that suit upon the claim of a creditor out of the State must be brought within two years after the final settlement. Then, we have also a statute (§3344 Burns 1901) as follows: "Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who shall have made any covenant or agreement shall be answerable upon such covenant or agreement to the extent of property descended or devised to them, and in the manner prescribed by law."

In *Bundy v. Ridenour*, 63 Ind. 406, it was held that for a breach of the covenant against encumbrances in a warranty deed, in the absence of fraud, there can be no recovery except of nominal damages, where there has been no eviction, and no payment of or upon the encumbrance.

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The covenant of warranty ran with the land. *Dehority v. Wright*, 101 Ind. 382; *Worley v. Hineman*, 6 Ind. App. 240.

The claim of the appellees for reimbursement of the amount expended in the extinguishment of the judgment lien did not accrue until after the final settlement of the deceased grantor's estate. The appellees were not required, as against the appellants, to anticipate that the judgment in question, taken against Corbaley and Freese and another, while Corbaley and Freese held the title to the real estate, would not be paid by the judgment debtors, but would be enforced against the land; but the appellees had the right to wait until the active measures mentioned in the pleadings were taken for the enforcement of payment of the judgment out of the land, and they were so compelled to pay off the encumbrance, whereby, and not sooner, they suffered the damage for which they sue. They were not, before that action on their part, creditors and holders of a claim, either due or not due, in the sense of the statutes above quoted. They ought not to be without a remedy, upon so meritorious a case, merely because of failing to do that which they were under no obligation to do. Without any fault of the appellees toward the decedent or his estate or the appellants, the appellees were not in a position to assert a claim for damages for breach of the covenant against encumbrances until they have been compelled to pay off the judgment lien. Having thus suffered damage by the breach of the covenant after the settlement of the estate of the deceased grantor, we think a fair view of the statutes as taken in *Blair v. Allen*, 55 Ind. 409, *Stevens v. Tucker*, 87 Ind. 109, and *Harmon v. Dorman*, 8 Ind. App. 461, should lead to the conclusion that the failure of the appellees to file a claim for breach of the covenant against encumbrances before the settlement of the decedent's estate, when they did not have a demand for a definite sum, should not exempt the appellants, as heirs

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of the covenantor, from being answerable upon the covenant to the extent of the property descended to them. The reasonableness of such a view of the case is illustrated by the evidence and the references thereto of the appellants in their brief, to the effect that while Corbaley and Freese owned the real estate in question there were four judgments of record entered against them—one called the “Wilson judgment,” February 11, 1890, for \$286.53; one called the “Sunshine judgment,” September 2, 1890, for \$275, which was paid after the conveyance to the appellees; one called the “Wise judgment,” September 22, 1890, for \$241.05, also paid, after the conveyance to the appellees; and the “McMahon judgment,” December 5, 1890, for \$633.17, against Corbaley, Freese, and Hart, in part paid in 1891, after the conveyance to the appellees. The real estate was conveyed to the appellees February 23, 1891, for \$610. The grantor died March 11, 1897. The decedent’s estate was finally settled in 1898, while each of the judgments against Corbaley and Freese, and that against them and Hart, so far as not paid, continued to be a lien on the real estate, and would so continue for ten years after the rendition thereof. Whether the real estate in question would ever be resorted to for the satisfaction of either of the judgments, remained an uncertainty at the time of the final settlement of the estate, and, if paid by the appellees, they could recover upon the covenant of warranty only to the extent of the amount of their purchase money and interest thereon. They could hardly be required to anticipate that the McMahon judgment, and it alone, would be pressed against the real estate, and to pay all the judgment liens might require an expenditure of more than the value of the real estate and interest thereon. The certificate of sale to Brannon was assigned for the purpose of cutting out the other judgments. The liability of the appellees to be called upon for the payment of any of the judgments was so far contingent at the time of the settle-

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ment of the decedent's estate that we think they should not be held to be deprived of a remedy against the heirs at law holding property descended from the covenantor.

It is insisted that the damages were excessive, and it seems to be thought that the appellants should have the benefit of the reduction of the amount of the mortgage debt made by reason of the possession and enjoyment of the real estate by the appellees. They received a deed of conveyance with full covenants, paid the entire purchase price, and went into possession under their conveyance. There could not arise any obligation on their part to their grantor for rents and profits. When they were subrogated to the rights of mortgagees in possession in the suit against the holder of the judgment and the sheriff, the deduction of the rental value of the premises while they had been in possession was made for the benefit of the junior judgment creditor. The amount which the appellees were required to pay of their own money to release the real estate which they recovered in this action was not greater than the purchase money and interest thereon.

It is claimed that there was a variance between the complaint and the proof, in that the complaint states that the appellees redeemed the real estate, while the proof was that they purchased the certificate of sale from Brannon. While the action of the appellees is spoken of in the complaint as a redemption, the facts stated in the same connection as to their action showed it to be the procurement of the assignment of the certificate for the purpose of cutting off the other judgment liens. The language of the complaint in this respect should be regarded as amended.

We find no available error. Judgment affirmed.

KRISE ET AL. v. WILSON ET AL.

[No. 4,517. Filed November 5, 1903.]

NEW TRIAL AS OF RIGHT.—*Two or More Causes of Action.*—Where two or more substantive causes of action proceed to judgment in the same case, one entitling the losing party to a new trial as of right, and the other not, a new trial as of right will not be allowed. *pp. 591, 592.*

PLEADING.—*Theory.*—*How Determined.*—The substantive facts pleaded, and not the prayer for relief, nor the name given to the action by the pleader, determine the nature of the cause of action; but where the prayer for relief is consistent with the facts pleaded, it is proper to consider it with the facts averred to determine the nature and character of the action. *p. 592.*

NEW TRIAL AS OF RIGHT.—*Complaint.*—*Theory.*—In a suit between heirs, the first paragraph of complaint alleged that at the time the ancestor conveyed the lands in question to defendants he was of unsound mind, and that afterwards plaintiffs gave defendants written notice disaffirming the deeds, demanding a reconveyance, asking that the deeds be set aside; the second paragraph contained the same averments except instead of averring the unsoundness of mind of grantor, it was averred that "none of the deeds were delivered" to defendants, asking the same relief as the first; the third paragraph averred that the plaintiffs were the owners of an undivided one-fourth interest in fee in the lands in question as tenants in common, asking that their title be quieted. *Held*, that the title to the land was involved in each paragraph of complaint, and that defendants were entitled to a new trial as of right. *pp. 592-594.*

From Tipton Circuit Court; *J. C. Blacklidge*, Special Judge.

Suit by Mary Krise and others against Isaac D. Wilson and others. From the action of the court in granting defendants a new trial as of right, plaintiffs appeal. *Affirmed.*

J. C. Herron, F. J. Byers, J. R. Coleman and Walter Carter for appellants.

Cooper & Gerhart, R. B. Beauchamp and R. H. Proctor, for appellees.

ROBINSON, C. J.—This appeal questions the action of the trial court in granting appellees a new trial as of right.

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Appellants' complaint is in three paragraphs. The first paragraph avers that appellant Mary Krise is a daughter, and the appellants granddaughters, of Granville M. Wilson, who died July 29, 1901; that appellee Margaret Daily is a daughter, and the other appellees are sons, of Granville M. Wilson, and that the appellants and appellees are heirs at law of Wilson; that on the 11th day of July, 1901, Wilson, the decedent, conveyed to each of the appellees certain lands; that at the time of the execution of the deeds he was of unsound mind; that afterwards, August 22, 1901, appellants gave appellees written notice disaffirming the deeds and demanding that appellees reconvey to appellants their interest in the land as heirs at law of Wilson, which appellees refused to do. Prayer that the deeds be set aside, and for all proper relief. The second paragraph contains the same averments, except, in place of averring the unsoundness of mind of the grantor, it is averred that none of the deeds were delivered to the appellees; asking the same relief as the first paragraph. The third paragraph avers that appellants are the owners, as tenants in common, of an undivided one-fourth interest in fee of the land; that appellees claim some interest adverse, which is without right, and is a cloud upon appellants' title; asking that their title be quieted. A trial resulted in appellants' favor, and, upon filing the statutory undertaking, a new trial as of right was granted appellees, resulting in a finding for appellees.

It is conceded that the third paragraph is an action to quiet title, but it is argued that neither the first nor the second paragraph is an action to quiet title or in ejectment, and that where two or more substantive causes of action proceed to judgment in the same case, one entitling the losing party to a new trial as of right, and the other not, a new trial as of right will not be allowed. The nature of an action must be determined from the general character and scope of the pleading. *Cottrell v. Aetna Life*

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Ins. Co., 97 Ind. 311; *First Nat. Bank v. Root*, 107 Ind. 224; *Bingham v. Stage*, 123 Ind. 281; *City of Ft. Wayne v. Hamilton*, 132 Ind. 487, 32 Am. St. 263. The substantive facts pleaded, and not the prayer for relief, nor the name given to the action by the pleader, determine the nature of the cause of action; but, where the prayer for relief is consistent with the facts pleaded, it is proper to consider it with the facts averred to determine the nature and character of the action. *Physio-Medical College v. Wilkinson*, 89 Ind. 23; *Martin v. Martin*, 118 Ind. 227; *Galway v. State, ex rel.*, 93 Ind. 161. It is a general rule that a pleading will be construed as proceeding upon the theory which is most apparent and most clearly outlined by the facts stated, and that it "will, if possible, be given such construction as to give full force and effect to all of its material allegations, and such as will afford the pleader full relief for all injuries stated in his pleading." *Monnett v. Turpie*, 133 Ind. 424; *Batman v. Snoddy*, 132 Ind. 480; *Monnett v. Turpie*, 132 Ind. 482.

The first paragraph of complaint is a proceeding in equity to have the conveyances canceled because of the unsoundness of mind of the grantor. Appellants could pursue this remedy, or they could have treated the conveyances as having been avoided by the disaffirmance, and, if out of possession, sue in ejectment or to quiet title. *Monnett v. Turpie*, 133 Ind. 424. The second paragraph is also a proceeding in equity to have the deeds canceled and declared ineffective because not delivered. But in each paragraph the title to the land, which is particularly described, is directly in issue. The only question the court was authorized to try, under the facts pleaded, was the title to the land. If the facts averred were found to be true, the appellees are not the owners of the land by virtue of the deeds, but under the averments the title is in both appellants and appellees as heirs at law of the grantor. The deeds carried the legal title to the appellees, and man-

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ifestly the disposition of these deeds will determine where the title should finally rest. If the deeds stand, the title is in appellees. If they are declared ineffective, the title is in appellants and appellees as heirs at law of the grantor. It is true the judgment says nothing about the title, but, as said in *Physio-Medical College v. Wilkinson, supra*, "the case, as made by the pleadings and tried between the parties, must determine the character of the action. * * *

It not infrequently happens that judgments are in a measure meaningless without reference to the pleadings." In the above case the facts averred are similar to the facts averred in the first paragraph here, and the prayer of the complaint asks, among other things, that the title be quieted. "The position of appellees' counsel," said the court in that case, "is that appellants are not entitled to a new trial as of right, for the reason that the action is neither for the possession of, nor to quiet title to, real estate; that it is simply to set aside the deed on account of the mental unsoundness of the grantor, and has no reference to the title to the land. In this we do not agree with counsel. It is a proper case in which to ask for the quieting of the title, and in which to compel the opposite party to assert his title. * * *

It is very patent, also, that, aside from the prayer, the title to the land is involved in the litigation."

In *Anderson v. Anderson*, 128 Ind. 254, the complaint was in three paragraphs. By the first it was sought to have a deed for land set aside because of alleged fraud and undue influence exercised by the grantee over the grantor; plaintiffs alleging that they were the owners of the land as heirs at law of the grantor who was deceased. The second paragraph was to quiet title to the same land, and the third for partition. In that case the court said: "The first paragraph, while in form an action to set aside a deed as fraudulent, is in legal effect an action to recover

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the land, it being averred, as above stated, that the deed was obtained by the grantee by fraud, and by undue influence over the grantor, who it is averred was the father of the appellants, and they his children and heirs. A suit by creditors to set aside a conveyance as fraudulent, and to subject the land to the payment of a debt, is not a case where a new trial as of right is allowed by the statute.

* * * But where, as in this case, the parties attacking the conveyance are not creditors, but heirs of the grantor, who is deceased, who seek by setting the deed aside to recover the land, we think a new trial may be claimed as of right by either party. *Warburton v. Crouch*, 108 Ind. 83; *Adams v. Wilson*, 60 Ind. 560; *Physio-Medical College v. Wilkinson*, 89 Ind. 23."

In the case of *Carpenter v. Willard Library*, 26 Ind. App. 619, the complaint, without specifically describing the real estate, sought to have a deed set aside because the grantor was not of sound mind, and because of undue influence and fraud, and also required an accounting. We think that case falls within the rule that a new trial as of right can not be allowed in an ordinary suit to set aside a fraudulent conveyance of land. See *Warburton v. Crouch*, *supra*, and cases there cited.

In the case at bar the suit is between heirs. Any relief appellants may secure must come through overthrowing the title of appellees acquired by the deeds. If the deeds are set aside, appellees' title through the deeds is divested. It must revest in some one. Under the facts pleaded, it would vest in appellants and appellees. It is manifest, we think, that the title to the land is involved in the litigation, and that a new trial as of right was properly granted.

Judgment affirmed.

Mulky v. Karsell.

MULKY v. KARSELL ET AL.

[No. 4,403. Filed November 5, 1903.]

VENDOR AND PURCHASER.—Vendor's Lien.—The right to a vendor's lien does not depend upon the transfer of a perfect legal title, nor is a conveyance to the person making the purchase essential thereto. *p. 596.*

PLEADING.—Remedy for Defective Statement.—The remedy for a defective statement in a complaint of a material fact is by motion to make more specific, not by demurrer. *p. 596.*

VENDOR AND PURCHASER.—Vendor's Lien.—Enforcement.—Complaint.—It is not necessary in a complaint to enforce a vendor's lien to negative the existence of facts amounting to a waiver of the lien. *p. 596.*

SAME.—Vendor's Lien.—Complaint.—Subsequent Purchasers.—Notice.—It is necessary in a suit to enforce a vendor's lien against subsequent purchasers to allege that the purchasers had notice of plaintiff's equity. *p. 597.*

SAME.—Vendor's Lien.—Assignment.—The general assignment of a purchase-money note carries with it the lien, and the assignee may thereafter enforce the same. *p. 597.*

From Monroe Circuit Court; *W. H. Martin*, Judge.

Action by James B. Mulky against James Karsell and others. From a judgment for defendants on demurrer to complaint, plaintiff appeals. *Reversed.*

R. A. Fulk, for appellant.

J. E. Henley, for appellees.

ROBY, J.—To appellant's complaint seeking to have a vendor's lien declared, a demurrer for want of facts was sustained. He refused to plead further, a judgment was rendered against him for costs, and he appeals.

The pleading is extremely inartistic. It is therein averred that on May 8, 1890, the Bloomington Oolitic Stone Company executed its promissory note, payable nine months after date, for the sum of \$150, to the order of Robert Marshall; "that said money was given for the unpaid purchase money for lots sixteen, twenty-three, and twenty-four in East's and Marshall's addition to the city

of Bloomington." It is further averred that said payee indorsed said note to plaintiff; that it is due and unpaid. The stone company is not a party to the action. It is averred to be insolvent, and to have no property subject to execution. It is not, in terms, stated that Marshall owned the lots, or that they were conveyed to the stone company. The substance of the facts relied upon in so far as the right to the lien is involved, is that the note sued upon was given for the unpaid purchase price of the land described, and that it is due and unpaid.

The right of the vendor's lien does not depend upon the transfer of a perfect legal title. *Johns v. Sewell*, 33 Ind. 1; *Fleece v. O'Rear*, 83 Ind. 200. Nor is its conveyance to the person making the purchase essential thereto. *Fleece v. O'Rear*, *supra*; *Martin v. Cauble*, 72 Ind. 67; *Humphrey v. Thorn*, 63 Ind. 296; *Scott v. Edgar*, 159 Ind. 38.

The execution of a note for the unpaid purchase price of real estate presupposes a conveyance. "It is unpaid purchase money that creates and sustains the lien." *Nichols v. Glover*, 41 Ind. 24; *Nutter v. Fouch*, 86 Ind. 451.

"Where real estate is sold and conveyed, and the purchase money or any part thereof remains unpaid, when these facts are stated by the vendor, he shows that he is entitled to and has the lien of a vendor in equity on such real estate, as a security for the payment of the unpaid purchase money." *Lord v. Wilcox*, 99 Ind. 491; *Fleece v. O'Rear*, *supra*; *Scott v. Edgar*, *supra*.

The remedy for a defective statement in a complaint of a material fact is by motion to make more specific, and not by demurrer. *Frain v. Burgett*, 152 Ind. 55; *Louisville, etc., R. Co. v. Bates*, 146 Ind. 564; *City of Connersville v. Connersville Hydraulic Co.*, 86 Ind. 235.

It was not necessary to appellant's cause of action that he negative the existence of facts amounting to a waiver of the lien. *Lord v. Wilcox*, *supra*.

Baltimore, etc., R. Co. v. Ryan.

It was necessary, the action being brought against subsequent purchasers, to charge them with notice of appellant's alleged equity. *Richards v. McPherson*, 74 Ind. 158; *Gaar v. Millikan*, 68 Ind. 208. The averments made in that respect are as follows: "That thereafter said Collins & Karsell sold and conveyed each of said lots to the defendants Henleys, who now own the same, who also had full knowledge that said plaintiff held said note, and that the same was unpaid, and that the maker was insolvent, and that the same was given for the unpaid purchase money of said lots."

The general assignment of the evidence of the debt incurred for purchase money carries the lien with it, and the assignee may thereafter enforce the same. *Smith v. Mills*, 145 Ind. 334; *Felton v. Smith*, 84 Ind. 485; *Midland R. Co. v. Wilcox*, 122 Ind. 84-91.

The facts stated were sufficient as against the demurrer. The judgment is reversed and the cause is remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent herewith.

Robinson, C. J., Henley, Black, and Wiley, JJ., concurring; Comstock, J., absent.

**BALTIMORE AND OHIO RAILROAD COMPANY v. RYAN,
ADMINISTRATRIX.**

[No. 4,507. Filed November 17, 1903.]

REMOVAL OF CAUSES.—*Complaint in More than One Paragraph.*—*Amount in Controversy.*—Where it affirmatively appears on the face of the complaint that all of the paragraphs of a complaint consisting of more than one paragraph, are based upon one and the same occurrence, the statement being varied merely to meet the evidence as it may appear on the trial, the amount of the one cause of action is controlling; and, if damages be not claimed in excess of \$2,000 in any of such paragraphs, the cause should not be removed to the federal court because of the amount in controversy.
p. 599.

SAME.—*Amount in Controversy.*—The amount in controversy fixed by

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the specific demand in a complaint for damages at \$2,000 is not modified by the formal prayer "for all other and proper relief in the premises," there being no proper relief other than the pecuniary remedy demanded. p. 600.

DEATH BY WRONGFUL ACT.—*Administrator May Sue for Sum Less than Limit Fixed by Statute.*—A statute authorizing an action by a personal representative for the benefit of the next of kin to one killed by the wrongful act of another, and limiting the amount of recovery to \$5,000, does not preclude the personal representative from suing for a sum less than \$5,000. pp. 600, 601.

SAME.—*Complaint.*—*Contributory Negligence.*—In an action against a railroad company for a death by wrongful act, the complaint need not aver absence of contributory negligence, nor need it state facts showing freedom from contributory fault. p. 601.

RAILROADS.—*Action for Damages Accruing in Another State.*—*Effect of Foreign Statute.*—Where a citizen of Indiana brings suit in a court in his own State, the action having accrued in a city in the state of Illinois, he is entitled to the benefit of an Illinois statute relative to the use of whistles and bells on locomotives, and of a city ordinance of the foreign city concerning the maintenance by a railroad company of gates at street crossings. pp. 601, 602.

PLEADING.—*Foreign Statute or Ordinance.*—*Action for Damages.*—Where an action for damages is instituted in this State, which action accrued in another state, and it is sought to take advantage of a statute or ordinance of the state where the action accrued, the statute or ordinance must be pleaded and proved. p. 602.

APPEAL.—*Denial of Term-time Appeal.*—*Harmless Error.*—The denial of a term-time appeal, if error, is harmless, where a vacation appeal is afterwards granted in which it affirmatively appears that a term-time appeal could not have resulted in benefit to the appellant. pp. 603, 604.

JUDGMENT.—*Setting Aside Default.*—*Misunderstanding of Attorney.*—A default will not be set aside on the ground that the attorney who suffered the default to be taken had misunderstood his instructions, where no reason for such misunderstanding is shown except that of forgetfulness and inattention. p. 604.

From Porter Circuit Court; *W. C. McMahan*, Judge.

Action by Mary E. Ryan, administratrix of the estate of Thomas J. Ryan, deceased, against the Baltimore & Ohio Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Pam, Calhoun & Glennon and *W. H. Dowdell*, for appellant.

N. L. Agnew, for appellee.

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BLACK, J.—The appellant has questioned in this court the jurisdiction of the court below, in which its application for the removal of the cause to the circuit court of the United States for the district of Indiana was denied. The appellee sued as administratrix of the estate of Thomas J. Ryan, deceased, to recover damages for causing his death by negligently running a locomotive engine and tender against him on a street crossing in the city of Chicago, Illinois. There were two paragraphs of complaint, in each of which the damages were laid in the sum of \$2,000, and at the close of each paragraph the appellee, in the same language, demanded judgment for that amount, and all other and proper relief in the premises.

In the verified petition for removal the appellee was said to be a citizen and resident of this State, and the appellant was alleged to be a corporation duly incorporated under the laws of another state named, and a citizen thereof, having its principal office there; and it was claimed in the petition that the matter in dispute, exclusive of interest and costs, exceeded the sum or value of \$2,000.

It is suggested as a reason why, upon the filing of the petition and bond, the cause should have been removed, that the aggregate of the damages demanded in the complaint was \$4,000. We can not accept this view. It is manifest that in each paragraph the same person in the same right seeks damages for the death of the same person wrongfully caused by the appellant's servants, and that each paragraph relates to the same time and place and the same occurrence. While each paragraph purports to set up a cause of action independently, there could not be a recovery for the aggregate amount of the damages demanded in both paragraphs. There could be a recovery only for one death, the damages from which the appellee did not claim to be greater than \$2,000, to which amount her damages would necessarily be limited. "By matter in dispute is meant the subject of litigation—the matter for which the suit

is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined.” *Lee v. Watson*, 1 Wall. (U. S.) 337. Where it thus affirmatively and clearly appears on the face of the complaint that all of the paragraphs of the complaint, consisting of more than one paragraph, are based upon one and the same occurrence, the statement being varied merely to meet the evidence as it may appear on the trial by alleging some other or additional negligent conduct, the amount of the one cause of action should be controlling; and, if damages be not claimed in excess of \$2,000 in any of such paragraphs, the cause should not be removed because of the amount in controversy. The amount in controversy was the amount demanded in the complaint. *Lake Erie, etc., R. Co. v. Juday*, 19 Ind. App. 436; *Western Union Tel. Co. v. Levi*, 47 Ind. 552.

There were not several causes of action arising out of one transaction or occurrence, but a single cause of action, though stated somewhat differently in the different paragraphs. *Brownell v. Pacific R. Co.*, 47 Mo. 239. If the plaintiff in such case should obtain in his favor either a general verdict, or a verdict on one count, this would bar a further recovery for the death of the intestate. The amount in dispute was not modified by the formal prayer for all other and proper relief in the premises, there being no proper relief other than the pecuniary remedy demanded. *Baltimore, etc., R. Co. v. Worman*, 12 Ind. App. 494.

The appellant, in its brief, refers to a statute of Illinois, which is set out in each paragraph of the complaint, authorizing such suit brought by and in the name of the personal representatives of the deceased person, it being provided that the amount recovered shall be for the exclusive benefit of the widow and next of kin, and the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of the

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deceased person, not exceeding the sum of \$5,000; and thereupon it is contended upon behalf of the appellant that the administratrix had no authority to sue for less than \$5,000 without the approbation of the court which appointed her, and that the amount legally in issue was that sum. Such an action is one for the recovery of unliquidated damages. The damages, by the terms of the statute, are to be such as the jury shall deem a fair and just compensation, having reference, in estimating and awarding them, to the pecuniary injuries resulting to the wife and next of kin. The statute does not designate the amount recoverable, but fixes the sum of \$5,000 as the limit which may not be exceeded by the jury. Of course, that amount can not properly be awarded if it should be more than sufficient to compensate such resulting injuries. The court, in acting upon the petition for removal, can not determine that in the particular case a greater amount might be recovered than that of the damages demanded, but, for the purposes of the application for removal, must conclude that no more can be recovered in the action than the amount laid and claimed as damages. The position thus taken by counsel may perhaps be regarded as not quite consistent with the claim that the matter in controversy was \$4,000, the sum of the amounts separately laid and claimed in each paragraph as damages. To be consistent, it should perhaps have been claimed that two distinct causes of action, each for the recovery of \$5,000, were declared upon.

Under an assignment of error assailing the complaint as insufficient, counsel for the appellant base the objection especially upon the absence of averments showing that the deceased exercised due care, and cite many decisions, the applicability of which as furnishing a rule of pleading has ceased because of our statute relieving the plaintiff in such case of the burden of showing want of contributory negligence on the part of the person injured or killed. It is no longer necessary in such case to allege in the com-

plaint the absence of contributory negligence, or to state facts showing freedom from contributory negligence.

In this connection it is claimed, also, that a statute of Illinois relating to the providing and using of whistles and bells on locomotive engines, set out in both paragraphs of the complaint, and an ordinance of the city of Chicago concerning the maintenance by railroad companies of gates at street crossings, set out in the second paragraph of complaint, relate only to the remedy in Illinois, and that to permit such statute or ordinance to affect the remedy in this case would be giving them extraterritorial effect, which they do not possess, as the law of Indiana governs the remedy, citing *Smith v. Wabash R. Co.*, 141 Ind. 92. Counsel perhaps misapprehended the decision cited, which is to the effect that a statute of another state concerning the presumption of negligence pertains to the remedy and can not have extraterritorial force.

"The quantity or degree of evidence requisite to sustain an action or to change the burden of proof is determined by the law of the forum, and not by the law of the place where the cause of action arose. It belongs not to the law of rights, but the law of remedy." *Richmond, etc., R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290; *Pennsylvania Co. v. McCann*, 54 Ohio St. 10, 42 N. E. 768; *Smith v. Wabash R. Co.*, *supra*; Elliott, Railroads, §1365.

The cause of action for the recovery of damages for pecuniary loss resulting from the death of the appellee's intestate by the negligence of the appellant, the right to recover having accrued in another state, under a statute similar in import and character to one in force in this State, was in the nature of a transitory cause of action, and the right to maintain the action was not confined to the state where the negligence complained of occurred, though in such an action instituted in this State such statute of the sister state must be pleaded and proved, inasmuch as our courts can not take judicial notice thereof. *Burns v. Grand*

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Rapids, etc., R. Co., 113 Ind. 169; *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439, 10 Am. St. 67; *Stewart v. Baltimore, etc., R. Co.*, 18 Sup. Ct. 105, 42 L. Ed. 537; *Dennick v. Railroad Co.*, 103 U. S. 11; *Law v. Western Railway*, 91 Fed. 817. The right of action was governed by the law of the state where the tort which caused the death was committed, though the action might be maintained by a personal representative appointed in this State. *Erickson v. Pacific Coast, etc., Co.*, 96 Fed. 80; *Van Doren v. Pennsylvania R. Co.*, 93 Fed. 260. If the objection were well taken as to the city ordinance, it could not be available to the appellant under an attack made by assignment in this court, which can not prevail unless all the paragraphs were insufficient; but the statute and the ordinance in question did not relate to the remedy, but did enter into the right to bring and maintain an action for the tort in Illinois. That right having so arisen there, the cause of action was transitory, and might be asserted in this State, though the action here is governed as to the rules of pleading and evidence, including presumptions and the burden of proof, by the rules of law of this State.

It is urged that the court erred in refusing to grant the appellant's prayer for an appeal in term time. The petition for the removal of the cause was filed in the same vacation in which the complaint was filed. At the term, the appellant, as appears from the record, entered its special appearance for the purpose of objecting to the further taking of jurisdiction of the cause. The court having overruled the objection, and the appellant, still appearing specially, having excepted to this ruling, it then refused to appear further in the cause, or to enter any appearance therein; whereupon the appellant was defaulted, and the cause was submitted to the court for trial. On the same day, after finding and judgment, the appellant appeared for the purpose only of praying an appeal to the Supreme Court, and tendered an appeal bond; and the prayer for

an appeal being denied, the appellant excepted to the ruling. Thus the appellant, having refused to appear in the cause and having voluntarily submitted to a default for want of appearance, was denied a term-time appeal. But it has brought a vacation appeal, and has failed to establish that the court had in any respect erred in the proceedings and judgment from which it prayed an appeal. This is not an appeal in a proceeding to compel the acceptance of an appeal bond and grant an appeal, but it is an appeal involving the same questions that would have been involved in a term-time appeal. This court will not reverse a judgment for a ruling of the trial court which did not injure the appellant. There must be some indication that the ruling was injurious. Where in a vacation appeal it appears affirmatively that a term-time appeal could not have resulted in benefit to the appellant, we can not set aside the judgment.

Some days after the rendition of judgment by default, the appellant moved the court to set aside the default and judgment on account of alleged inadvertence and mistake of one of the appellant's attorneys. In overruling this motion there was no error. The attorney refused to appear and purposely suffered a default, and, under well-settled practice, there was no sufficient reason set forth in his affidavit for opening up the case. If he failed to follow directions from his superior, as seems to be claimed, no reason is shown therefor other than that he discovered after the rendition of the judgment that he had inadvertently overlooked or misunderstood instructions, which, as stated, required him to enter objections and appearance, and to pray an appeal and perfect the same, in case of necessity, and to do all such necessary acts to accomplish the defense of the company in the trial of the cause, and which, it is stated, did not authorize the attorney to enter a special appearance in the cause. No reason for misunderstanding such instructions is apparent, and to have inadvertently overlooked

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them, which could only be through forgetfulness or inattention, was not a sufficient ground for relief.

Judgment affirmed.

INDIANAPOLIS STREET RAILWAY COMPANY v.
DAWSON.

[No. 4,529. Filed November 17, 1903.]

STREET RAILROADS.—*Conspiracy to Assault Colored People at Company's Park.—Knowledge of Danger.—Liability.—Evidence.—Notice.*—A street railway owned a park adjacent to a city where it maintained attractions for the public. The company had knowledge of a conspiracy on the part of certain persons to assault and insult colored people who might visit the park, but nevertheless transported plaintiff, a colored man, to the park without warning him of his danger. Upon arriving at the park, plaintiff was assaulted by the conspirators, the employes of the railway company, though present, making no attempt to interfere. *Held*, that the street railway company was liable; and that evidence of similar occurrences was admissible to show notice.

From Superior Court of Marion County; (62,656)
Vincent G. Clifford, Special Judge.

Action by George J. Dawson against the Indianapolis Street Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

F. Winter, C. Winter and W. H. Latta, for appellant.
I. D. Blair and O. V. Royall, for appellee.

ROBY, J.—Action by appellee. Verdict and judgment for \$500. Demurrers to first and second paragraphs of complaint overruled. Motion for a new trial overruled.

It is averred in the first paragraph of complaint, in substance, as extracted from a multitude of words, that appellant was on August 25, 1901, a corporation operating a street railway system in Indianapolis and was a common carrier for hire; that it owned a park near said city, and maintained certain attractions therein to induce persons to ride on its cars, inviting them to said park; that on

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the day named it gave a free band concert therein, the same having been extensively advertised prior thereto; that on said day appellee, accompanied by a lady, took passage upon one of its regular cars, and was conveyed to said park; that a large number of persons were daily transported thereto, among them a large number of lawless persons who were hostile to colored people, of whom appellee was one, their names being unknown to plaintiff, and who had long before said day entered into a conspiracy "to suppress, molest, assault, and insult colored people generally who might visit said park;" that in pursuance of such conspiracy said persons assaulted and beat appellee, and drove him from the park; that he and his companion demeaned themselves in a lady-like and gentlemanly manner, but upon arriving at the park were set upon by a large number of white boys and young men, appellee being assaulted and beaten by them; that appellant had, and had had for a long time prior to said day, full notice and knowledge of said conditions, and of the unlawful purposes aforesaid, and of acts of violence committed thereunder, but took no steps to prevent such conduct; that early in the afternoon of said day said lawless men and boys began marching and drilling openly in said park preparatory to an attack upon any colored male person who should be found there later, appellant taking no steps to prevent such conduct or to notify colored people of the danger, although it had knowledge thereof; that neither appellant nor its officers made any objection to the open and notorious gathering of white men and boys for the unlawful purpose stated; that it was negligent and indifferent in not employing and using a sufficient number of guards and policemen to maintain the peace; that two of its guards or policemen aided and abetted the wrong done appellee by standing by while he was being unmercifully beaten by said crowd of lawless white men and boys, and offering him no assistance, although they were able to do so, and could have prevented injury to

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him. "Wherefore, by reason of the matters therein stated, the plaintiff has been damaged," etc. The second paragraph of complaint is somewhat more extended than the first one, but for the purpose of this opinion the statement made is sufficient.

The pleading charges appellant with notice of the alleged conspiracy, with acquiescence therein, and, by its guards or policemen, with passive participation in the actual assault made upon appellee. "When one expressly or by implication invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the place reasonably safe for the visit." Cooley, Torts (2d ed.), 718; *Howe v. Ohmart*, 7 Ind. App. 32, 38; *Richmond, etc., R. Co. v. Moore*, 94 Va. 493, 37 L. R. A. 258; *North Manchester, etc., Assn. v. Wilcox*, 4 Ind. App. 141; *Penso v. McCormick*, 125 Ind. 116, 21 Am. St. 211.

No case has been cited or found where the premises upon which the injury complained of occurred, and to which the complainant came by invitation, were made unsafe through a conspiracy of the nature set up herein. Danger usually has been attributed to some defect in the premises themselves. But as a matter of principle it is quite as reprehensible to invite one knowing that an enemy is awaiting him with intent to assault and beat him as it would be to invite him without having made the floor or the stairway secure. One attending an agricultural fair in response to a general invitation extended to the public has been awarded damages against the association where his horse was killed by target shooting upon a part of the ground allowed for such purpose. *Conrad v. Clauve*, 93 Ind. 476, 47 Am. Rep. 388.

Recoveries have also been sustained: When spectators rushed upon a race-track, causing a collision between horses

being driven thereon. *North Manchester, etc., Assn. v. Wilcox*, 4 Ind. App. 141. When an opening was left in a fence surrounding a race-track, through which one of the horses, running, went among the spectators. *Windeler v. Rush County Fair Assn.*, 27 Ind. App. 92. Where horses were started on a race-track in opposite directions at the same time, causing collision. *Fairmount, etc., Assn. v. Dourney*, 146 Ind. 503. Where a horse with a vicious habit of track bolting was permitted to run in a race, such horse bolting the track, causing injury. *Lane v. Minnesota, etc., Soc.*, 62 Minn. 175, 29 L. R. A. 708. Recognizing the rule of reasonable care to make the premises safe, a recovery was denied in the absence of any evidence of the immediate cause of a horse running through the crowds. *Hart v. Washington Park Club*, 157 Ill. 9, 29 L. R. A. 492. Where a street car company maintained a park as a place of attraction for passengers over its line, the falling of a pole used by one making a balloon ascension, under a contract, injuring a bystander, recovery was allowed, the rule being announced that the company must use proper care to protect its patrons from danger while on its grounds. *Richmond, etc., R. Co. v. Moore*, 94 Va. 493, 37 L. R. A. 258. Where a street car company maintained a large stage for exhibitions, in a pleasure resort owned by it, and made a written contract with a manager, by which the latter furnished various entertainments, among which was target shooting, one injured by a split bullet was allowed to recover, it being held that he might safely rely on those who provided the exhibition and invited his attendance to take due care to make the place safe from such injury as he received. The question of due care being one for the jury. *Thompson v. Lowell, etc., St. R. Co.*, 170 Mass. 577, 40 L. R. A. 345; *Curtis v. Kiley*, 153 Mass. 123.

The duty of common carriers to protect their passengers from injury on account of unlawful violence by persons not connected with their service has frequently furnished

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material for judicial consideration. The New Jersey court of errors and appeals approved an exhaustive and carefully considered opinion delivered by the supreme court of that state to the effect that a passenger who, while attempting to have her baggage checked, was knocked down and injured by cabmen, in no sense servants of the carrier, scuffling on a passageway under its control, might recover against it. *Exton v. Central R. Co.*, 63 N. J. L. 356, 56 L. R. A. 508. In what seems to have been a pioneer case, it was held by the supreme court of Pennsylvania in 1866, that it was the duty of the trainmen on a passenger-train to exert the forces at their disposal to prevent injury to passengers by others fighting in the car. *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512. Ten years later the supreme court of Mississippi, after very exhaustive arguments by eminent counsel of national reputation, reached the same conclusion. *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200.

Without further elaboration it may safely be said that the unusual character of an alleged peril, from which it is averred the appellant did not use due care to protect its visitors, does not affect the right of recovery, it being otherwise justified. The demurrers were therefore correctly overruled.

Evidence was introduced of other prior assaults at said park upon colored persons, and articles previously published by daily newspapers in the city describing such occurrences were also admitted. In order to determine whether appellant used due care, it was essential to show its knowledge or means of information relative to the conditions alleged to exist, rendering it dangerous for appellee to visit the park. The evidence of similar occurrences was competent as tending to show notice of the conditions. *Toledo, etc., R. Co. v. Milligan*, 2 Ind. App. 578; *City of Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *City of Goshen v. England*, 119 Ind. 368, 375.

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The facts upon which appellant's liability depends otherwise than heretofore considered were questions for the determination of the jury. There was evidence tending to establish, and from which the jury might properly find, the existence of such facts.

Appellant and its officers appear to have displayed indifference to the conditions existing which it and they could not well help knowing. This may have been due to the idea, sometimes entertained, that as to acts of lawlessness it is a sufficient duty of citizenship to be indifferent. Such idea is entirely erroneous.

Judgment affirmed.

STARS v. HAMMERSMITH ET AL.

[No. 4,446. Filed May 26, 1903. Rehearing denied November 17, 1903.]

PLEADING.—Sham Pleading.—Motion to Strike Out.—Examination of Adverse Party.—A complaint can not be stricken out as sham pleading upon answers to questions propounded to a party, pursuant to §517 Burns 1901, providing for the examination of an adverse party as witness.

From Clark Circuit Court; *J. K. Marsh*, Judge.

Action by William Stars against Louis Hammersmith and others. From a judgment for defendant, plaintiff appeals. *Reversed.*

L. A. Douglass, for appellant.

Jacob Herter and *G. H. Hester*, for appellees.

WILEY, J.—Appellant sued appellees to recover damages for personal injuries alleged to have been sustained while he was in their employment as a servant. In his amended complaint he avers that his injuries were occasioned by the carelessness, etc., of a co-employee, whom appellees knew was inexperienced, etc., and that appellant was ignorant thereof. Upon motion of appellees, and by order of court,

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appellant's examination was taken under §517 Burns 1901. This examination was duly filed and published. Appellee thereupon filed their motion to strike out the amended complaint on the ground that it was "sham and false in fact, as shown by the answers of the plaintiff to interrogatories propounded to him upon his examination previous to the trial in said cause." This motion was sustained and exception reserved, and the motion, ruling thereon, and the exception thereto are brought into the record by a bill of exceptions.

While the record presents, and counsel have discussed, the question of the court requiring appellant to submit himself to a second examination after the first had been filed and published, it is unnecessary for us to decide it. Section 385 Burns 1901, provides: "An answer or other pleading shall be rejected as sham, either when it plainly appears upon the face thereof to be false in fact, and intended merely for delay, or when shown to be so by the answers of the party to special written interrogatories propounded to him to ascertain whether the pleading is false," etc.

In this case appellant's complaint was rejected as sham and false upon his examination under the statute. §517 Burns 1901. That statute provides that a party to an action may be examined as a witness concerning any matter stated in his pleading at the instance of the adverse party, etc. Section 518 Burns 1901 provides the manner in which the examination shall be taken, and §519 provides that it shall be taken and filed as a deposition in the cause, and that it may be read by the party taking it. The latter provision evidently refers to its being read upon the trial of the cause. The question for decision is this: Can a party's pleading be rejected as sham and false, when it does not so appear on the face of it, except in accordance with the provision of §385, *supra*? In other words, if it should appear to the trial court, from the

examination of the party under the statute, that his pleading was false or sham, would the court be warranted in rejecting it?

In this jurisdiction the legislature has declared the manner in which a pleading may be stricken out as a sham where it does not so appear on its face, and that is when it is shown to be so by the answers of the party to special written interrogatories propounded to him to ascertain whether the pleading is false. As the legislature has provided this mode of procedure and no other, it would seem that it should be followed.

In *Moyer v. Brand*, 102 Ind. 301, it was held that a party seeking to have a pleading stricken out, on the ground that it was a sham, must proceed in the manner provided by the statute,—citing §382 R. S. 1881. This is §385 Burns 1901. It was also held that this section adopts the rule of practice as laid down in the cases of *Beeson v. McConnaha*, 12 Ind. 420, and *Lowe v. Thompson*, 86 Ind. 503. The practice as provided by statute was recognized in *Pittsburgh, etc., R. Co. v. Frazee*, 150 Ind. 576, 65 Am. St. 377. Until the revision of 1881, the authority of trial courts to reject sham pleadings was limited to “sham defenses.” *Lowe v. Thompson, supra*. It is a drastic proceeding to reject and strike out a plaintiff’s complaint, and this should never be done except where the reason clearly appears, and then in harmony with the provision of the statute.

Our conclusion is that it was error for the court to reject and strike out appellant’s complaint. The judgment is reversed, and the cause remanded for further proceedings in harmony with this opinion.

WEBB v. HAMMOND.

[No. 4,458. Filed November 17, 1903.]

REFORMATION OF INSTRUMENTS.—Contract.—Complaint.—A complaint, in a suit to reform a contract, which contains a succinct statement of the contract as intended by the parties, and the agreement actually reduced to writing and signed, and pointing out the differences between the contract agreed upon and the one alleged to have been signed by mistake, is sufficient to withstand a demurrer. *p. 617.*

SAME.—Rule of Equity.—Equity will reform a written contract whenever through mutual mistake, or the mistake of one of the parties accompanied by fraud of the other, it does not, as reduced to writing, correctly express the agreement of the parties. *p. 617.*

APPEAL.—Review of Evidence.—In all cases not triable by a jury, the appellate tribunal, under §8 of the act of March 9, 1903 (Acts 1903, p. 341), will consider the weight and sufficiency of the evidence. *p. 619.*

REFORMATION OF INSTRUMENTS.—Contract.—Sufficiency of Evidence.—In a suit to reform a written contract, the proof is insufficient to sustain a judgment for plaintiff, where the provisions of the contract sought to be reformed were not proved. *p. 619.*

APPEAL.—Review of Evidence.—Pleadings as Evidence.—Pleadings will not be considered as a part of the evidence on appeal, unless as shown by the record, they were introduced as evidence at the trial. *p. 620.*

From Superior Court of Marion County (62,210); *Vinson Carter*, Judge.

Suit by Catharine J. Hammond against Mary A. Webb and husband. From a judgment for plaintiff, defendant Mary A. Webb, appeals. *Reversed.*

F. E. Gavin, T. P. Davis and J. L. Gavin, for appellant.
W. N. Pickerill, for appellee.

WILEY, J.—Action by appellee against appellant to reform a contract and to recover a sum of money alleged to have been paid under such contract. Demurrer to the complaint overruled, and answer in denial. Appellant filed a cross-complaint asking affirmative relief, upon which issues were joined by answer. Trial by the court, finding

and judgment for appellee, motion for a new trial overruled.

Overruling the demurrer to the complaint and the motion for a new trial are assigned as errors.

The complaint avers that the appellant and appellee are sisters, being daughters of Robert Roe, deceased. By the will of the deceased, appellant and appellee were each devised twenty-six and two-thirds acres of land in the northeast quarter of section eighteen, township sixteen, range four, in Marion county, Indiana; that deceased had three daughters and two sons, to the latter of which he devised forty acres of land each, and to his three daughters twenty-six and two-thirds acres each. This division of land by will was made upon the basis that there were only 160 acres in the quarter section; that upon a survey of the land it was ascertained that there were 164 64-100 acres, and that the actual area of land devised to appellee and her two sisters was twenty-seven and forty-four hundredths acres; that said division of land under the will was made into strips running entirely across said quarter section east and west; that the several tracts of land so devised were surveyed at the instance of all the parties in interest, and that each of the devisees thereupon went into possession of their respective tracts. The complaint avers that appellee being desirous of acquiring the interest of appellant in the partition of the real estate devised to her lying east of the Allisonville gravel road, upon which were located the buildings of the "Home farm," she entered into a written contract with appellant, by the terms of which appellee was to deed to appellant the land which had been devised to her west of said gravel road, and appellant was to deed to appellee that portion of the land devised to her, lying east of said road; that it was further agreed that both of said tracts were to be surveyed, their differences in area ascertained, if any, and the one having the greater area was to receive from the other for such excess, payment therefor at the

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rate of \$150 per acre; that appellee was also to pay the appellant the sum of \$250 for the buildings which were then known to be located upon that portion of the land devised to appellant, lying east of said road; that thereupon they signed a written contract which they both believed to express what they had mutually agreed upon; that pursuant to the agreement, as they understood it, they had the two tracts of land surveyed—*i. e.*, appellee's tract west of said road and appellant's tract east of said road—and the difference given them was three and ninety-seven hundredths acres which appellant's land exceeded in acreage that of appellee's; that upon said survey as reported to them by the surveyor appellee paid to appellant \$595.50 for said supposed excess, and also paid to her \$250 for the buildings located on that part of the real estate owned by appellant lying east of said gravel road; and thereupon they exchanged deeds in carrying out the supposed terms of the contract between them. It is then averred that the actual difference between said two tracts of land was two and seventy-four hundredths acres, instead of three and ninety-seven hundredths acres, as was learned from the surveyor who had surveyed the same, and that appellee paid to appellant for one and twenty-three hundredths acres more than was actually conveyed to her, being the sum of \$184.50 too much money; that said error was the result of a miscalculation of said surveyor; that appellee thereupon demanded of appellant that she rectify said error, and refund to her said sum of \$184.50, which she refused to do.

The complaint further avers that the contract as written provides that appellant and appellee agreed to convey lands as follows: That appellant was to convey to appellee the land which the former owned on the east side of the Allisonville gravel road, as well as the land which the latter herself owned on the east side of said road, and which she held by devise under the will of her father, and that appellee was to convey to appellant not only the land which

appellee owned on the west side of said road, but also the land which appellant owned on the west side of said road, which she already owned by devise from her father; that said contract as written required of the parties thereto to pay to the other the difference between said tracts of land at the rate of \$150 per acre, thus causing appellee to pay to appellant for land which she (appellee) already owned, at the rate of \$150 per acre. It is also alleged that the contract as written was and is not what the parties thereto had agreed upon and intended it should be, and that the signing of said contract was done under a misapprehension of what it really was and what was really set out therein, and was a mistake of fact, and not of law, and was the mutual mistake of all the parties thereto; that all of the negotiations prior to the signing of said contract were as to what amount appellee should pay appellant for the buildings on that portion of the land east of said road which appellant was to convey to appellee, and the price per acre that should be paid for the difference in the acreage; that in the settlement which they entered into appellant and appellee acted under the belief that such was their agreement and understanding; that the contract, as appellee claims it should be, was attempted to be carried out in good faith by each of the parties; that appellee did not know of the mistake the surveyor had made in determining the difference in the acreage of said tract of land until a settlement had been made and the money paid as hereinafter stated. The contract as written is made an exhibit to the complaint. The prayer of the complaint is that the contract be reformed so as to express the agreement between the parties, and for judgment for the amount claimed to have been overpaid by appellee.

The theory of the complaint is that, as each of the parties owned land on both sides of the road, the appellee agreed to deed to appellant her part on the west side in consideration that appellant should deed to appellee her tract

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on the east side, and one party should pay to the other \$150 an acre for the excess, if any, in the acreage; while it is the theory of the cross-complaint that one party should pay to the other \$150 an acre for the excess in area, of the entire acreage on either side of the road, and that the excess in acreage now owned by appellee under the contract and conveyance is five and forty-three hundredths acres, and that appellee had failed to pay the amount due by \$219. If appellant's theory is correct, the terms of the contract required appellee to pay to appellant \$150 per acre for the excess in the acreage of her tract on the east side of the road, which she already owned under the will.

The first question for decision is, are the facts pleaded in the complaint sufficient to warrant a reformation of the contract? A complaint to reform a contract, to be good as against a demurrer, must set forth the terms of the original agreement, and also the agreement as reduced to writing, and point out with clearness wherein the mistake was made. It must also aver that the mistake was mutual. *Smelser v. Pugh*, 29 Ind. App. 614; *Citizens Nat. Bank v. Judy*, 146 Ind. 322.

The complaint before us contains a clear and succinct statement of the contract as actually made, understood, and intended by the parties to be reduced to writing, and the agreement actually reduced to writing and signed by them. The material differences between the contract as actually made and agreed upon and the one signed by the parties are clearly and specifically stated, and, as the demurrer admits the facts pleaded, the conclusion necessarily follows that the mistake was mutual. *Smelser v. Pugh*, *supra*; *Keister v. Myers*, 115 Ind. 312; *Roszell v. Roszell*, 109 Ind. 354; *Baker v. Pyatt*, 108 Ind. 61.

The established rule is that equity will reform a written contract whenever, through mutual mistake, or the mistake of one of the parties accompanied by fraud of the other, it does not, as reduced to writing, correctly express the agree-

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ment of the parties. *Smelser v. Pugh, supra; Citizens Nat. Bank v. Judy, supra.*

There is no element of fraud in this case. Equity requires an amendment to a contract in writing that will make the instrument what the parties supposed and intended it should be. *Eastman v. Provident Mut. Relief Assn.*, 65 N. H. 176.

In *Citizens Nat. Bank v. Judy, supra*, at page 342, the court quotes with approval from *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963, the following: "That where an instrument is drawn and executed that professes or is intended to carry into execution an agreement, which in writing or by parole, previously made between the parties, but which by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. The reason of the rule being that the execution of agreements fairly and legally made is one of the peculiar branches of equity jurisdiction, and if the instrument intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if the party had refused altogether to comply with his engagement, and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other by compelling the delinquent party to perform his undertaking according to the terms of it and the manifest intention of the parties."

That which is reduced to writing is not the whole and sole agreement, but the stipulations between competent contracting parties constitutes the contract, while the writing is only evidence of the agreement or the coming together of minds. *Sparta School Tp. v. Mendell*, 138 Ind. 188.

The basis upon which appellee seeks to have the contract reformed is that it does not express the agreement entered into, and the complaint plainly and specifically

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states what the agreement between the parties was, and avers that the written contract was made and signed by mutual mistake. The complaint also shows how appellee's rights were prejudiced by that mistake. In addition to the above authorities as to what facts a complaint to reform a contract must state to be good, we cite the following: 20 Am. & Eng. Ency. Law, 720; *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 72; *Wood v. Deutchman*, 75 Ind. 148; *Nelson v. Davis*, 40 Ind. 366; *Easter v. Severin*, 78 Ind. 540; *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16; *Pingrey, Mortgages*, §270.

Counsel for appellant urge some objections to the complaint which, in the light of the authorities, we do not deem necessary to consider. The complaint states a cause of action, and the demurrer to it was rightfully overruled.

Appellant's motion for a new trial was based upon the ground that the finding of the court was contrary to law, and not sustained by sufficient evidence, and that the court erred in admitting and excluding certain evidence.

In all cases not triable by a jury the appellate tribunal, under the act approved March 9, 1903 (Acts 1903, p. 338), will consider and weigh the evidence, under a proper assignment of error.

It is also the province of the court to consider and determine the sufficiency of the evidence. *Habbe v. Vicle*, 148 Ind. 116; *Lake Erie, etc., R. Co. v. Stick*, 143 Ind. 449; *Wabash Paper Co. v. Webb*, 146 Ind. 303.

One of the essential requisites to a complaint to reform a written instrument is that it should set out the instrument as written. This is a necessity, for without the written contract the court would have nothing before it as a basis of reformation. It being necessary to set out in the complaint the contract for which a reformation is sought, it is equally necessary that such contract must be proved by competent evidence; and, in the absence of a showing that it has been lost or can not be produced, or

some other legitimate reason, the best evidence is the contract itself. The general rule is that a party must introduce the best evidence in support of his case that is at his command. Every fact pleaded which is essential to a recovery by the party upon whom rests the burden must be proved, otherwise he fails to make out his case.

In this case appellee failed to prove the provisions of the written instrument which she asks to be reformed. Such written instrument was not introduced in evidence, does not appear in the bill of exceptions, and no proof of its loss or destruction was made. There is no evidence as to its contents. Counsel for appellee concede this, but seek to avoid its absence from the record by the assertion that the pleadings of a case are always in evidence. It has time and again been held in this jurisdiction that courts of appeal can only consider such facts as are properly certified as evidence. If the proposition relied upon by appellee is correct, then in an action upon a promissory note, where such note or a copy has been filed with the complaint, a recovery could be had without introducing the note in evidence. This is not the law. In an action against the maker of a promissory note alleged to have been assigned by written indorsement there can be no recovery, if the general denial is in, without proof of such indorsement. *Shonkwiler v. Dunavin*, 1 Ind. App. 505; *Moore v. Hubbard*, 15 Ind. App. 84.

In an action upon an official bond the bond itself is an indispensable part of the plaintiff's evidence. If the bond is not put in evidence, nor its absence accounted for, nor any cause, reason, or excuse shown for the omission to put it in evidence, its omission is fatal to the party having the burden. *Bowers v. State, ex rel.*, 69 Ind. 60. See, also, *Higman v. Hood*, 3 Ind. App. 456; *Lucas v. Smith*, 42 Ind. 103.

In *Citizen's Nat. Bank v. Judy, supra*, it was held that in an action to reform a written contract the party alleging

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the mistake holds the affirmative, must satisfy the court beyond a reasonable doubt that the agreement he claims to have made was in fact made between the parties, and that a mistake has occurred in reducing such agreement to writing. See also *Martin v. Bennett*, 26 Wend. 169; *Koen v. Kerns*, 47 W. Va. 575, 35 S. E. 902; *Boyertown Nat. Bank v. Hartman*, 147 Pa. St. 558, 30 Am. St. 759; *Insurance Co. v. Nelson*, 103 U. S. 544.

We are asked to affirm a judgment reforming a contract, when the instrument to be reformed is not before us, and, so far as the record shows, was not before the trial court. This we can not do. The evidence, as certified to us, and which we must accept as being correct, and all the evidence given at the trial, is insufficient to support the finding and judgment, in that there is a total absence of any evidence as to what the contract, as written, was.

This conclusion makes it unnecessary to consider other questions presented by the motion for a new trial.

Judgment reversed, and the court below is directed to sustain appellant's motion for a new trial.

WIENEKE ET AL v. DEPUTY.

[No. 4,586. Filed November 18, 1903.]

QUIETING TITLE.—*Evidence Admissible Under General Denial.*—In a suit to quiet title, the defendant may, under the general denial, introduce evidence tending to show a mistake in the description of the real estate contained in the conveyance under which he claims. pp. 622, 623.

REFORMATION OF INSTRUMENTS.—*Parol Evidence.*—Parol evidence is admissible in suits for reformation, to establish the fact of the mistake, in what it consists, and to show how the writing should be corrected in order to conform to the agreement already made. p. 624.

QUIETING TITLE. — *Ejectment.* — *Cross-Complaint.* — *Offer to Convey.* — Plaintiff and defendant were in possession of adjoining tracts of land known as the "west acre" and the "middle acre" respectively. Each had a deed for the tract in possession of the other. Plaintiff brought suit for possession of the west acre, and to quiet title. Defendant filed cross-complaint to quiet title, setting

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up that by mistake of the grantor, who owned both tracts at the time, the middle instead of the west acre was described. *Held*, that without an offer to make deed of conveyance to plaintiff for the "middle acre" the defendant could not recover on his cross-complaint. pp. 623-625.

From Jackson Circuit Court; *D. A. Kochenour*, Special Judge.

Suit by Albert J. H. Wieneke and another against Solomon Deputy to quiet title. From a judgment for defendant on his cross-complaint, plaintiffs appeal. *Reversed*.

O. H. Montgomery, for appellants.

J. M. Lewis and *O. O. Swailes*, for appellee.

ROBY, J.—Action by appellants in ejectment and to quiet title. Answer in general denial. Cross-complaint by appellee to quiet his title to the same real estate described in the complaint. Answer in general denial. Other paragraphs of answer set up no matter not admissible under the general denial. Trial by the court. Finding and judgment for appellee. Error assigned upon the action of the court in overruling the appellant's motion for a new trial.

Appellee was permitted to introduce evidence tending to show a mistake in the description of the real estate contained in the conveyance under which he claims. Appellant contends that in so much as there was no pleading filed by appellee setting up the mistake and praying for a reformation of the instrument, such evidence was inadmissible. The statute provides that under the general denial in cases of this class the defendant shall be permitted to give in evidence every defense to the action that he may have either legal or equitable. §1067 Burns 1901. The uniform holdings have been that under this statute the defendant may plead the general denial, "and introduce any facts upon the trial which, according to the principles of equity as applied by the courts of chancery, would defeat appellant in obtaining a decree quieting his title

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to the land in question." *Reed v. Kalfsbeck*, 147 Ind. 148; *Allen v. Indianapolis Oil Co.*, 27 Ind. App. 158; *Watkins v. Lewis*, 153 Ind. 648; *Indiana, etc., R. Co. v. Allen*, 113 Ind. 581. The cases of *Conger v. Parker*, 29 Ind. 380, and *King v. Enterprise Ins. Co.*, 45 Ind. 43, 59, relied upon by appellant, are not in point. *East v. Peden*, 108 Ind. 92, 95. If *Cain v. Hunt*, 41 Ind. 466, can be considered as applicable, it must be regarded as overruled by the later and better considered cases before cited. The court did not, therefore, err in overruling the objections to evidence based upon the ground stated. The right thus conferred does not enable the defendant to avail himself of it for affirmative relief.

Mary Mooney, an unmarried woman, owned in 1897 a tract of land in Jackson county, containing three acres. On December 23 of that year she sold one acre to Jacob Schumback. The land owned by her is referred to in the evidence as the "east acre, middle acre, and west acre." Said parcels lying side by side, each being 83 feet wide by 516 feet deep. The deed to Schumback contained a description of the middle acre. Thereafter, on June 10, 1892, he made his deed, containing the same description, to appellee. Schumback, upon receiving his deed, took possession of the west acre, and transferred said possession to appellee, who has since the date of his deed had possession of said west acre, which he continues to hold, insisting at the trial that a mutual mistake was made by Mary Mooney and Schumback in the description inserted in the first deed, and that such mistake was followed in the Schumback deed to him. Appellee asserts that the description inserted in the deed made by Mary Mooney correctly described the land sold, but that Schumback took possession of the wrong land. Mary Mooney thereafter departed life, and such proceedings were had as resulted in the sale of her real estate and the execution of an executor's deed to Frank Roseberry for the west acre. Said Roseberry, how-

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ever, took possession of the middle acre. In November, 1900, he conveyed to appellant, who, by virtue of such conveyance, has a clear record title to the west acre occupied and claimed by appellee. Appellant and his grantor had actual as well as constructive notice of appellee's equity when the Mooney title was acquired by them. The court found for appellee that the wrong description was by mistake inserted in the deeds under which he claimed.

The mistake was not a mistake of law, but one of fact. *Citizens Nat. Bank v. Judy*, 146 Ind. 322, 346. Parol evidence is admissible in suits for reformation, to establish the fact of the mistake, in what it consists, and to show how the writing should be corrected in order to conform to the agreement already made. Pomeroy, Eq. Jurisp. (2d ed.), §859. "Equity will not interpose in such a case, unless there is the clearest and most satisfactory proof of the mistake and of the agreement of the parties." *Gray v. Woods*, 4 Blackf. 432; *Oiler v. Gard*, 23 Ind. 212, 218; *Board, etc., v. Owens*, 138 Ind. 183, 187; Pomeroy, Eq. Jurisp. (2d ed.), §859.

A witness was introduced by appellee who testified that he was a civil engineer, and was employed by Mary Mooney to "lay off an acre" for Schumback, "it to be the third acre west;" that the east acre was already laid out; that he laid out the west acre; that she told him to stake off the west acre, and that he did so, and furnished her a description, but did not know whether the description was followed in the deed or not, although it was made for that purpose. Another witness testified that he had a conversation with Mary Mooney relative to the purchase by him from her of the middle acre; that he paid her \$5 a year rent for two years for it; that she told him she had sold the third (west) acre to Schumback, who then took possession of it. That he did so take possession and hold it is undisputed. As a circumstance tending to show his understanding of the agreement, the effect is persuasive, and,

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in the absence of an explanation, it is difficult to believe that he did not suppose that it had conveyed that portion to him. On the other hand, it is not probable he would have been allowed to continue his occupancy for so long a time without protest, except as the grantor had the same understanding. There was evidence tending to show that the appellant took the middle acre upon the supposition that it was the part conveyed to Roseberry. Appellee made improvements on the west acre. We are not able to say that the evidence is insufficient to sustain the finding that the mistake asserted was in fact made.

Appellee, by virtue of the conveyance above referred to, was vested with an apparent title to the middle acre of said land. He seeks to obtain in this action title to the west acre, and the judgment does quiet his title thereto. It destroys appellant's title thereto, and leaves him with nothing to take its place, while appellee now has title to both the west and middle acres. The maxim that he who seeks equity must do equity is applicable. No offer was made by appellee to rectify on his part the mistake asserted. He neither conveyed, tendered conveyance, nor offered to convey to appellant. He should have tendered a deed, or taken such other action as would divest him of the appearance of holding that to which he admits he has no right. It is no answer to say that appellant may bring an action to obtain reformation of his deed. Neither is the absence of the representatives of the Mooney estate material. Appellee has title to, and, so far as shown by the record, proposes to hold the land that, upon his own theory, belongs to appellant.

The judgment is reversed, and the case is remanded, with instructions to sustain motion for a new trial and for further proceedings.

**LIFE ASSURANCE COMPANY OF AMERICA v.
HAUGHTON ET AL.**

[No. 4,418. Filed June 19, 1903. Opinion modified November 18, 1903.]

INSURANCE.—*Life Policy.*—*Proof of Death.*—*Complaint.*—Where a life policy insures against the death of insured “from any cause,” a complaint on the policy by the beneficiaries need not aver proof of the cause of death, although the policy contains a provision that the company will pay the amount of the policy to the beneficiaries “immediately upon receipt and approval of the proofs of the death and cause of death” of the insured. p. 627.

APPEAL.—*Submission of Interrogatories to Jury.*—*Presumption.*—Where on appeal the record is silent as to the submission of certain interrogatories which the record shows to have been returned by the jury with answers, and to have been treated by the court and counsel as properly before the court at the time and after they were returned, it will be presumed that they were properly submitted. pp. 628, 629.

TRIAL.—*Defective Answers to Interrogatories by Jury.*—Where proper interrogatories are propounded to a jury, and they return a general verdict, it is the duty of the jury to answer the same in a direct and positive manner. Such answers as “Don’t know,” “So stated,” or “It is so stated” are imperfect, and upon proper objection and motion the court should require the jury to retire and return proper answers. pp. 632-634.

From Knox Circuit Court; O. H. Cobb, Judge.

Action by Pernilla P. Haughton and others against the Life Assurance Company of America. From a judgment for plaintiffs, defendant appeals. *Reversed.*

A. C. Ayres, A. Q. Jones, J. E. Hollett and W. C. Johnson, for appellant.

W. A. Cullop, G. W. Shaw, Alvin McClure and J. T. Goodman, for appellees.

WILEY, J.—Appellees sued appellant upon an insurance policy issued upon the life of one George A. Haughton, appellees being named therein as beneficiaries. The complaint was in a single paragraph. The cause was put at issue by answer and reply. Trial by jury, resulting in

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a verdict in favor of appellees. With the general verdict the jury answered and returned interrogatories. After the return of the verdict and answers, appellant moved the court that the jury be required to retire to the jury room and answer certain of the interrogatories more definitely, which motion was overruled. It also moved for judgment on the answers to interrogatories notwithstanding the general verdict. Appellant's motion for a new trial was also overruled.

The assignment of errors presents for review the overruling of the demurrer to the complaint, the overruling of the demurrer to the second paragraph of reply, and the overruling of the motions for judgment on the interrogatories and for a new trial.

The only objection urged to the complaint is that there is no specific averment, or its equivalent, concerning proof as to the cause of death. There is a provision in the policy that the appellant would pay to the beneficiaries "immediately upon receipt and approval of proofs of the death and cause of death of George A. Haughton," the insurance. The policy also contained this provision: "Proofs of death must be furnished the company at its home office within one year after the death of the assured, and must comply fully with the company's form." No complaint is made as to the form of the proof of death. In the latter provision to which we have referred, it is not made a condition precedent to the right to recover on the policy that proof of the cause of death should be made. The policy nowhere limits the liability of the company on account of death from any specific cause, but, by its terms, agrees to pay the amount specified upon the death of the assured from any cause, upon proof of death. Taking the policy as a whole, and construing the contract of insurance most strongly against the appellant, as we must, we think that the first provision relating to proof of death and cause of death, is so qualified by the latter that the inference is

fair and reasonable that the parties intended as a condition of payment only that proof of death should be made. The complaint avers that due proof of death was made. The objection to the complaint upon this point is not well taken, and the demurrer was correctly overruled.

If it be conceded that the second paragraph of reply was not sufficient, the action of the court in overruling a demurrer to it was harmless, for the jury were instructed that appellees did not introduce any evidence in support of it, and that therefore it should not be considered. Counsel for appellant admit that if the ruling was error it is not available.

While not in the order in which counsel have discussed the questions presented by the record, we will next consider the refusal of the court, on appellant's motion, to require the jury to answer more specifically certain interrogatories which they returned with the general verdict. Counsel for appellees contend that the question is not presented by the record, because there is no formal entry that the interrogatories were properly submitted by the court, and that the jury was not instructed touching their duty in relation thereto. The statute provides that in all cases, except suits in equity, upon the request of either party, the court shall instruct the jury to find specially upon particular questions of fact, to be stated to them in writing in the form of interrogatories, on any or all the issues in the cause. It is also provided that the interrogatories shall be recorded with the verdict. §555 Burns 1901. The legislature having made these provisions, courts should give litigants such benefit and relief as they are entitled to by reason thereof, whenever the question is properly presented. Even where the parties have not requested it, the court, on its own motion, may submit interrogatories, and may also revise those submitted. *Killian v. Eigenmann*, 57 Ind. 480; *Lauter v. Duckworth*, 19 Ind. App. 535; *Hammond, etc., R. Co. v. Spyzchalski*, 17 Ind. App. 7; *Senhenn v. City of Evans-*

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ville, 140 Ind. 675; *Louisville, etc., R. Co. v. Worley*, 107 Ind. 320.

The record shows the following: "And now, the arguments of counsel being made, the jury having received the instructions of the court, * * * they retire in charge of a sworn bailiff to consider their verdict." Then follows an order-book entry in these words: "Come again the parties, come also the jury, and return in open court their general verdict for plaintiffs, as follows." Then follows the general verdict, signed by the foreman. Immediately following the general verdict is this entry: "And also return interrogatories and their answers thereto as follows." Following this are thirty-one interrogatories, all of which are answered in some form, and each answer is signed by the foreman of the jury. Before the jury were discharged, counsel for appellant objected to the answers to the interrogatories, as being indefinite and insufficient, and interposed a motion to require the jury to answer them definitely, etc., and this motion was overruled. The motion and ruling thereon are brought into the record by bill of exceptions. One of the causes for a new trial was the action of the court in overruling this motion. If the interrogatories and answers thereto are properly in the record, they are subject to review. As the record is silent as to the submission of the interrogatories, and the court and counsel treated them as properly before the court and jury, and no objection of appellees appears in the record, and as interrogatories can only go to the jury by the consent and knowledge of the court, we must presume that they were properly submitted, and that the court discharged its duty in that regard. It appears from the record that the jury returned into open court, with their general verdict, their answers to a series of interrogatories, and that such interrogatories are set out in the record immediately following the general verdict, in harmony with the provisions of the statute. Under such facts it can not be pre-

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sumed, in the absence of any further showing, that the court thus received from the jury, and made part of the record of the cause, answers to interrogatories which had not been submitted properly to the jury, with correct instructions concerning them. *Byers v. Davis*, 3 Ind. App. 387; *Shoner v. Pennsylvania Co.*, 130 Ind. 170; *Pennsylvania Co. v. Meyers*, 136 Ind. 242; *Frank v. Grimes*, 105 Ind. 346. Our conclusion is that the interrogatories and answers are properly in the record, and that the refusal of the court to require the jury to make their answers more definite and specific is reviewable.

Appellant rested its defense upon the ground of breach of warranty as to specific facts stated in the application for insurance. It is urged that when he made application for the insurance he was then afflicted with a malignant and fatal disease, and that it soon thereafter caused his death; also that he purposely and fraudulently concealed such fact from appellant. His application for the insurance was in writing, in which he gave specific answers to many direct and pointed questions, and his answers thereto were warranted to be true. The following are some of the questions and answers: "Have you any disease or disorder? If so, what? A. None." "For what have you sought medical advice in the past seven years? A. None." "Have you ever had any of the following? Answer concerning each, give particulars under head of remarks." Then follows a long list of diseases, etc., and among them there are: "Swelling of glands;" "tumors of any kind;" "ulcers or open sores." "Have you had any illness, injury, disease, or disorder other than as stated herein?" To each of these last inquiries he answered, "No." By his application and answers to all questions propounded he represented himself as sound in body, and free from any disease or disorder.

It is averred in the answer that soon before he made application for insurance, he had consulted two physicians

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about a swollen and diseased testicle, and that at the time he made his written application he had arranged to have a surgical operation performed to remove the diseased member; that he had been advised by his physician that such operation was necessary to save his life, and that possibly that would not do it; that such operation was soon thereafter performed; that his disease was of a cancerous character, and that it caused his death. By the interrogatories propounded to the jury it was sought to establish by the answers thereto specific and affirmative facts touching the matters set up in the answer, and upon which the defense was based. Some of those facts were whether or not the insured, at the time he made application for insurance, was afflicted with a malignant tumor of a cancerous character; if he had not consulted physicians about it; if he had not taken treatment for it; if he had not then arranged with two physicians to have a surgical operation performed to remove it; if he had not been advised by his physicians that such disease and disorder were dangerous to his life, and that even that might not prevent death. There were some thirty or more interrogatories, and each of them was susceptible of being answered definitely, and yet the jury did not make a specific answer. All the answers may be grouped in the following phrases: "So stated;" "It was so stated;" "Don't know;" and "Evidence not sufficient." The rule is that where interrogatories are propounded to a jury, and they return a general verdict, it is the duty of the jury to answer such interrogatories in a direct and positive manner, if evidence has been introduced as to any given fact to which an interrogatory has been addressed, unless the jury disagree as to how such fact should be answered, and such disagreement should be reported to the court. Where evidence has been given, pertinent to any fact to which an interrogatory has been addressed, and the jury answer "Don't know," or "We don't know," the special findings are imperfect and insuf-

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ficient, and it is the duty of the trial court, upon objection and proper motion, to require the jury, under instructions, to retire and answer such interrogatory or interrogatories, if they can agree upon an answer or answers. A case directly in point is that of *Cleveland, etc., R. Co. v. Asbury*, 120 Ind. 289, at pages 291 and 292. See, also, the following: *Buntin v. Rose*, 16 Ind. 209; *Rosser v. Barnes*, 16 Ind. 502; *Duesterberg v. State, ex rel.*, 116 Ind. 144; *Sage v. Brown*, 34 Ind. 464; *Peters v. Lane*, 55 Ind. 391; *Maxwell v. Boyne*, 36 Ind. 120; *Reeves v. Plough*, 41 Ind. 204; *Hopkins v. Stanley*, 43 Ind. 553; *Summers v. Great-house*, 87 Ind. 205. The same rule applies where the answer by the jury is "Evidence not sufficient." See *Maxwell v. Boyne, supra*.

This leaves for consideration the stereotyped answers of the jury, "So stated," or "It is so stated," made to many of the interrogatories. The policy was executed on the 10th day of December, 1898, upon the written application of the insured. In his application he made the following warranty: "I warrant on behalf of myself and any person who have or claim to have any interest in any policy issued under this application, each of the above answers to be full, complete, and true. I agree on behalf of myself and any person who shall have or claim any interest in any policy issued under this application, as follows: (1) That the foregoing application, together with any assurance made to the medical examiner, in continuation of and forming a part of the application, shall be a consideration for and basis of the contract of the Life Assurance Company of America, under any policy issued under this application." In his application he was asked and answered the following questions: "Have you any disease or disorder? If so, what? A. None." "Have you ever had any illness, injury, disease, or disorder other than as stated herein? A. No." "For what have you sought medical advice during the past seven years? A. None."

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He also stated in his medical examination that he had never had "swelling of the glands," or "tumors of any kind." All of these answers he warranted to be true. To many of the interrogatories addressed to the jury which were pertinent to the facts which he stated to be true in his application, the jury answered, "So stated," or "It is so stated." If we could construe these answers so as to hold that the jury, by them, intended to answer the interrogatories in the affirmative, then the answers would have been responsive and sufficient, but we can not so construe them.

Evidently what the jury meant was that evidence had been introduced pertinent to and concerning the several interrogatories, but their answers thereto were not statements of substantive facts. If the jury had returned a general verdict in the following form: "We, the jury, find that there was some evidence in support of plaintiff's cause of action"—it would have been an imperfect and incomplete verdict, for it would not have been conclusive of any fact. The verdict must be certain, positive, and free from all ambiguity. It must convey on its face a definite and precise meaning, and must show just what the jury intended. An obscurity which renders it doubtful will be fatal to it. 1 Graham & Waterson, New Trials, 159. See, also, *Hopkins v. Stanley*, *supra*.

To state the proposition differently, and possibly more tersely, by the answers to the interrogatories we are now considering, the jury meant to say that they were of the opinion that certain facts existed. In the case of *Diehl v. Evans*, 1 Serg. & Raw. 367, the court, by Tilghman, C. J., in commenting upon a verdict where the jury said they were "of opinion" that a certain matter had transpired, said: "An opinion is not a legal verdict; the finding must be positive." The Supreme Court, in *Hopkins v. Stanley*, *supra*, quoted with approval the following: "It has long been well settled, that the courts will give validity to verdicts when they perceive the substance of the issue

to be contained in the verdict, however rude or informal the finding of the jury may have been expressed. In the language of Ch. J. Hobart, 'the court will work the verdict into form, and make it serve.' For verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity, originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work injustice."

Facts specially found by way of answers to interrogatories, which are pertinent to the issues, are as much a part of the verdict as the general verdict itself. By express command of the statute, they are recorded with the verdict, and become a part of the record. In many cases the facts thus specially found are of controlling influence, and when in irreconcilable conflict with the general verdict the latter must fall, and the judgment be pronounced upon the former.

In this case, most, if not all, of the interrogatories, under the evidence, which as to many of the questions was without conflict, were susceptible of being positively and definitely answered by "yes" or "no." If they had been answered in the affirmative, as warranted by the evidence, such answers would have disclosed the existence of the vital facts upon which appellant relied for its defense. Such facts, if found by the jury, would have overthrown the general verdict. We are not saying that it was the duty of the jury so to have found, but there was ample evidence upon which they could have done so, and no evidence of the contrary. They might have wholly disbelieved and discredited the evidence, as was their province, but, in any event, they should have answered the interrogatories so as to have established affirmative or negative facts.

There seems to have been a disinclination to answer the interrogatories, and we have never seen a more flagrant disregard on the part of jurors in avoiding the perform-

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ance of a sworn duty. As was said in the case of *Cleveland, etc., R. Co. v. Asbury*, 120 Ind. 289, "The evidence was not complicated, and there was very little conflict, if any, as to many of the facts inquired for in the interrogatories," and the appellant was entitled to have them answered. That issue was directly involved by the interrogatories propounded to the jury. They were direct and pertinent to that issue, and the jury were as much bound to answer them as they were to return a general verdict; and it was the duty of the court, upon appellant's motion, to require them to give a plain and direct answer to each interrogatory, unless, upon due consideration, they could not agree. *Peters v. Lane*, 55 Ind. 391, and authorities there cited.

This conclusion necessarily leads to a reversal, and, as a new trial must follow, other questions presented may not arise again, and need not here be decided.

Judgment reversed, and the court below is directed to sustain appellant's motion for a new trial, and for further proceedings in harmony with this opinion.

BURKE ET AL. v. BARRETT ET AL.

[No. 4,369. Filed May 26, 1903. Rehearing denied October 9, 1903. Appeal to Supreme Court dismissed November 18, 1903.]

WILLS.—Remainders.—Vesting of Titles.—Life Estates.—Construction.—
A testator by the terms of his will gave all of his real estate to his wife during her life, subject to the support of his minor children named, two sons and two daughters, made the wife executrix, and guardian of the children, and provided that "after the death of my wife, I devise and bequeath my real estate to my said children in the following manner: (1) I give and devise to each of my said daughters one-eighth part of my real estate. (2) To each of my said sons I give and bequeath three-eighths of my real estate. The above bequests are subject to the life estate of my wife in the said real estate. * * * If any of my said children should die before they would be entitled to shares given them under this will then the survivors shall share equally the share of the one who is dead, unless the one who dies leaves lawful children surviving him or her." *Held*, that each of the children took a vested remainder at the death of the testator, the

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daughters each taking one-eighth, and the sons each three-eighths thereof, subject to the life estate of the widow; that the phrase "after the death of my wife" relates to the beginning of the enjoyment of the remainder, and not to the vesting of the estate, and that the provision in reference to the death of the children has reference to the death of a child during the lifetime of testator.

From Vigo Circuit Court; *J. E. Piety*, Judge.

Action by Richard J Barrett and others against Mary Burke and others. From a judgment in favor of plaintiffs, defendants appeal. *Reversed.*

H. S. Wallace, G. M. Crane, D. V. Miller and A. L. Miller, for appellants.

H. J. Baker and L. D. Leveque, for appellees.

ROBY, J.—Appellee Barrett brought suit for partition, alleging that he was the owner of five-eighths, and appellant Mary Burke was the owner of the remaining three-eighths, of the real estate in controversy. Appellant Burke answered by general denial, and filed two paragraphs of cross-complaint, in the second paragraph of which she alleged title specifically and asked that she be declared the owner of the thirty-three sixty-fourths, and the appellee Barrett the owner of thirty-one sixty-fourths, of the real estate; that her title be quieted; and that partition be decreed. Demurrers to the cross-complaints were sustained. Various pleadings were filed and rulings made thereon, which need not be noticed. Trial by court. Finding and judgment for appellee Barrett that the parties were the owners of the real estate as alleged in the complaint, and partition was ordered and made. Motions to modify the judgment and for a new trial overruled.

Error is assigned on the various rulings, but counsel agree that the only question involved is the construction of the will of John Barrett, deceased, and this is the only question argued in the respective briefs.

So far as material here, appellant Burke's second paragraph of cross-complaint in substance alleged that John

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Barrett, father of appellee Barrett and grandfather of appellant Burke, died in 1874, seized of the real estate in controversy, leaving a will which was duly probated and is now in full force and effect, the material provisions thereof being as follows, to wit: "Second. I give and bequeath to my wife Ellen Barrett, all my real estate during her life, subject to the support of my minor children, Jerry Barrett, Richard Barrett, Honora Barrett, and Ellen Barrett. I do hereby make the support and education of these my said children a charge upon my real estate until they shall become of age or shall have married. Third. After the death of my wife, I devise and bequeath my real estate to my said children in the following manner: (1) I give and devise to each of my said daughters one-eighth part of my real estate. (2) To each of my said sons I give and bequeath three-eighths of my real estate. The above bequests are subject to the life estate of my wife in the said real estate. Fourth. I do hereby nominate and appoint my beloved and faithful wife, Ellen Barrett, the sole executrix of this my last will and testament, and the guardian of my children, who may be minors at the time of my death. Fifth. If any of my said children should die before they would be entitled to shares given them under this will, then the survivors shall share equally the share of the one who is dead, unless the one who dies leaves lawful children surviving him or her."

John Barrett left surviving him his wife, Ellen Barrett, who lived until October, 1899; Jerry Barrett, who died in August, 1876, leaving no child or children, but leaving his mother Ellen Barrett, and Richard, Honora, and Ellen Barrett, his brother and sisters, as his only heirs; Honora Barrett, who married J. P. Burke, and died in 1889, leaving her husband and appellant Mary Burke, her only child, as her only heirs at law, and J. P. Burke died in 1895, leaving Mary Burke as his only heir at law; and Ellen Barrett, his daughter, who died in 1890, leaving no child or

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children, and leaving her mother, Ellen Barrett, appellee Barrett, and appellant Burke as her only heirs. Ellen Barrett, widow, by her will devised all her property to appellant Mary Burke, and said will was duly probated and is now in full force and effect.

Appellees contend that, by the terms of the will of John Barrett, the manifest intention of the testator was to give the widow a life estate, and to give to his children living at the death of his widow, and to the descendants of such as were then dead, a vested remainder, which was alterable, conditional, and limited, and that the time fixed by the testator himself for its ripening into a certain and absolute fee simple was at the widow's death; the contention of the appellant being that John Barrett's children each took a remainder which vested absolutely upon the testator's death.

Construing this will as a whole, we are of opinion that at the death of the testator the interest in the real estate taken by each of the testator's children, and to which they were then entitled, was a vested remainder, subject only to the life estate of the widow, the daughters each taking one-eighth and the sons each taking three-eighths thereof.

The law favors the vesting of estates, and the presumption is that the testator intended that the estate given should vest at his decease, unless an intention to postpone the operation of the devise is clearly expressed. *Rumsey v. Durham*, 5 Ind. 71, 74; *Aspy v. Lewis*, 152 Ind. 493, and cases cited.

The intent to postpone the operation of the devise must be clear and manifest, and must not arise by mere inference or construction. *Moore v. Hare*, 144 Ind. 573, 575.

In the case last cited the court said: "It is settled law that words of survivorship in a will, unless there is a manifest intent to the contrary, always relate to the death of the testator, and that in the absence of contrary intent a will always speaks as from the testator's death. * * *

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The law not only favors the vesting of remainders, but it also presumes that words postponing the estate relate to the beginning of the enjoyment of the remainder and not to the vesting of such estate. In the absence of a clear manifestation of the intention of the testator to the contrary, an estate will be held to vest at the earliest possible period. The intent to postpone must be clear and manifest and must not arise by mere inference or construction."

The rules above quoted were restated, affirmed, and applied in *Aspy v. Lewis, supra*. In view of these rules, there being no manifest intent to the contrary, it must be presumed that the clause "after the death of my wife," used in the third item of the will, relates to the beginning of the enjoyment of the remainder and not to the vesting of that estate, and when the clause is so construed it is consistent and reconcilable with the last sentence of the third item, providing that the bequests given to the children shall be subject to the life estate of the wife.

The fifth item of the will, providing that if any of the "children should die before they would be entitled to the shares given them under his will," etc., has reference to the death of a child during the lifetime of the testator, for the reason, if for no other, that, as is shown above, the "share given" to each child was a vested remainder which became operative at the death of the testator, and at that time each child was entitled to the share given him. It follows, therefore, that the court erred in sustaining appellees' demurrer to the second paragraph of cross-complaint.

Judgment reversed, with directions to overrule the demurrer to the second paragraph of cross-complaint, and for further proceeding in accordance with this opinion.

**BURNS v. TRUSTEES OF HUNTERTOWN CEMETERY
CHURCH ET AL., AND HOLMES ET AL. v. TRUSTEES
OF HUNTERTOWN CEMETERY CHURCH ET AL.**

[No. 4,421. Filed November 19, 1903.]

APPEAL AND ERROR.—*Joint Assignment of Error.—Separate Exception.—*

Parties who jointly assign error can not invoke the judgment of the Appellate Court upon a ruling on a motion made by one of them separately, to which action of the court he alone excepted.

p. 641.

SAME.—*Term-time Appeal Not Perfected.—*An appeal prayed and granted in term, but not perfected, will be treated as a vacation appeal. *p. 642.*

SAME.—*Term-time Appeal.—Perfected in Vacation.—Parties.—*Section 647a Burns 1901, concerning appeals by part of coparties, relates by its terms to term-time appeals alone, and has no application to an appeal asked and granted in term but not perfected. *p. 642.*

From the Superior Court of Allen County; *J. H. Aiken*, Judge.

Actions by Arthur Burns and others against the Trustees of Huntertown Cemetery Church and others, consolidated. From judgments in favor of defendants, plaintiffs appeal. *Appeal dismissed.*

T. E. Ellison and H. G. Keegan, for appellants.

W. C. Geake and W. N. Ballou, for appellees.

BLACK, J.—Six causes were pending in the court below to foreclose mechanics' liens against certain real estate of the Huntertown Cemetery Church, each brought by a single plaintiff. After the filing of the complaints the causes were consolidated, and, the issues in the consolidated case having been made up and tried, the court rendered personal judgments in favor of Arthur Burns, John Masson, Frank L. Holmes, and Leonard Brockerman, in a certain sum for each separately, against W. Chester Scarlet, a subcontractor, and rendered judgment in favor of Nathaniel Glazier, Hezekiah Hillegass, and Solomon Simons, trus-

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tees of Huntertown Cemetery Church, and Mathias Fitch, Ellis Dunton, James Ballou, and Nathan Glazier, building committee of the church, and Edward Wickliff and Andrew Craig, principal contractors, against Frank L. Holmes, Leonard Brockerman, John Masson, W. Chester Scarlet, and Arthur Burns, jointly, for costs.

There have been filed in this court two assignments of error. In one, Frank S. Holmes, Leonard Brockerman, Charles Ransbottom, John Masson, W. Chester Scarlet, and Arthur Burns are named as the appellants, and the church and its trustees and its building committee and the principal contractors, by their several names and designations as set forth in the judgment, with some others not named in the judgment, are named as the appellees. The six persons thus named as appellants in this assignment jointly assign that the court erred in overruling the motion of the appellant Burns for a new trial. The parties thus made appellants, and who thus jointly assign error, can not invoke the judgment of this court upon a ruling on a motion made by one of them separately, to which action of the court he alone excepted.

In the other assignment of error, Arthur Burns is named as sole appellant, and the church and the persons who were its trustees, the principal contractors, the trustees of the church as such, the members of its building committee as such, and Holmes, Brockerman, Ransbottom, Masson, and Scarlet are named as appellees, and Burns alone has assigned as error the overruling of his motion for a new trial. No appearance has been made here for any of the parties so named as appellees except by counsel representing the church, and no appearance has been made for any party except Burns as appellant. There was no error in overruling this separate motion of Burns for which he could complain in this court against the other plaintiffs, against whom and himself jointly the court rendered judg-

ment for costs in favor of the other appellees. An appeal was prayed by Burns separately, and was granted in term, but it was not perfected, and the case is to be treated as a vacation appeal.

The act of 1895 (Acts 1895, p. 179, §647a Burns 1901), concerning appeal by part of coparties, relates by its terms to term-time appeals alone, and has, therefore, no application in the case now before us. In case of an appeal by a part of several coparties in vacation there must be compliance with the provisions of §647 Burns 1901; and all the other coparties should be named as appellants, and notice to them as such of the appeal should be given, and they should not be named as appellees and notified as such. *Gregory v. Smith*, 139 Ind. 48; *Wood v. Clites*, 140 Ind. 472; *Ledbetter v. Winchel*, 142 Ind. 109; *Lee v. Mozingo*, 143 Ind. 667; *Shuman v. Collis*, 144 Ind. 333; *Perry v. Botkin*, 15 Ind. App. 83; *Walsh v. Brockway*, 13 Ind. App. 70.

If, for the purpose of ascertaining the character of the proposed appeal of Burns, we may properly look to his motion for a new trial, the overruling of which is assigned as error, we do not find it to have been intended to relate merely to the finding in favor of Burns against Scarlet. It purports to be made by Arthur Burns alone in a case of *Frank Holmes v. Trustees of Huntertown Cemetery Church*, the consolidated proceedings, no doubt, being intended; and the chief purpose of the appellant Burns appears to have been to subject the property of the church to his mechanic's lien. The court found against all the plaintiffs on this branch of their several demands, and rendered judgment against them jointly for costs. The other plaintiffs were interested in the appeal, and should have been named and notified as appellants, and not as appellees.

The appeal as to both assignments of error is dismissed at the costs of the appellant Arthur Burns.

Stoy v. Bledsoe.

STOY v. BLEDSOE ET AL.

[No. 4,546. Filed November 19, 1903.]

APPEAL.—Sufficiency of Answer.—The sufficiency of an answer can not be raised for the first time by an assignment of error in an appellate tribunal. p. 644.

SAME.—Joint Assignments of Error.—Answers.—A joint assignment of error challenging the sufficiency of two paragraphs of answer is not available if either paragraph is good. p. 645.

CHATTEL MORTGAGES.—Failure of Consideration.—Foreclosure by Assignee.—A mortgage on a span of mules was executed to secure two notes for the purchase money thereof. Before the notes became due the mules were taken from the purchaser under a prior mortgage the existence of which the purchaser had no knowledge at the time he executed his notes and mortgage. *Held*, that the consideration for the last notes and mortgage had wholly failed and that a holder thereof who took an assignment with knowledge of the facts could not recover thereon. pp. 645–647.

SAME.—Assignee Takes Notice of Terms.—Where, by the terms of a mortgage executed to secure the payment of two notes, both notes become due and collectible upon default in the payment of one of them, an assignee who takes the assignment after such default is chargeable with knowledge that both notes were past due at the time. pp. 647, 648.

From Martin Circuit Court; *H. Q. Houghton*, Judge.

Suit by William L. Stoy against Anthony Bledsoe and another. From a judgment for defendants, plaintiff appeals. *Affirmed*.

J. B. Marshall and *A. L. Carrico*, for appellant.

Hiram McCormick and *F. E. Gilkison*, for appellees.

WILEY, J.—November 28, 1900, appellee Anthony Bledsoe executed to one Hughs two notes for \$100, each payable at a bank within this State, one of which notes was due August 28, 1901, and the other one year from date. To secure their payment Bledsoe executed a mortgage on certain real estate, in which his wife, his co-appellee, joined. The mortgage was duly recorded. December 6, 1900, Hughs assigned the notes and mortgage to Houghton and

Moser, who, on September 2, 1901, assigned the same to said Hughs, who on September 11, following, assigned said notes and mortgage to appellant without recourse. The several assignments of mortgage were duly acknowledged and recorded. Appellee Anthony Bledsoe at the same time executed a chattel mortgage to said Hughs upon a span of mules, wagon, etc., which he had purchased of Hughs, to secure the payment of the notes sued on, and this mortgage was also assigned to Houghton and Moser. Appellant, as assignee, sued on the notes and to foreclose the mortgage covering the real estate. The cause was put at issue by answer and reply. Trial by the court, and upon proper request the court made a special finding of facts, and stated its conclusions of law thereon. The conclusions of law were to the effect that appellant was not entitled to recover, etc.

There are five specifications in appellant's assignment of errors, viz.: (1) That the court erred in overruling the demurrer to the second and third paragraphs of answer; (2) the court erred in its conclusions of law; (3) the court erred in overruling appellant's objection to the admission of certain evidence; (4) that appellee's answer, nor either paragraph, does not state facts sufficient to constitute a defense, etc.; and (5) the court erred in overruling appellant's motion for a new trial.

The third and fourth specifications do not present any question for review. The only way the question attempted to be raised by the third was to assign it as a reason for a new trial. As to the fourth, it has many times been ruled that the sufficiency of an answer can not be raised for the first time in an appellate tribunal by an assignment of error. *Elwood, etc., Co. v. Harting*, 21 Ind. App. 408; *Austin v. McMains*, 14 Ind. App. 514; *Stephens v. Smith*, 27 Ind. App. 507; *City of Evansville v. Martin*, 103 Ind. 206; *State, ex rel., v. Curry*, 134 Ind. 133.

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The first specification challenges the sufficiency of the second and third paragraphs of answer jointly. It follows that if either of them is sufficient to withstand a demurrer the assignment is not available, even though the other might be bad. *American Tin-Plate Co. v. Guy*, 25 Ind. App. 588; *Kahn v. Gavit*, 23 Ind. App. 274; *Colles v. Lake Cities Electric R. Co.*, 22 Ind. App. 86; *Town of Thorntown v. Fugate*, 21 Ind. App. 537; *Boots v. Ristine*, 146 Ind. 75; *City of South Bend v. Turner*, 156 Ind. 418, 83 Am. St. 200.

We shall first consider the second paragraph of answer. This paragraph attempts to set up facts showing that the consideration for which the notes in suit were given had wholly failed before they were assigned to appellant, and that he took them with knowledge of that fact. It is averred that the notes were given for a span of mules and other personal property purchased of Hughs by appellant Anthony, and that the mortgage was given to secure their payment; that at the time of said sale and the execution of the notes, appellant's assignor did not have a legal title to said property, in that there was an unpaid mortgage upon said property in favor of Houghton and Moser for \$250, and that appellees had no knowledge thereof; that at the time said notes were executed appellees also executed a chattel mortgage on the property purchased of said Hughs as an additional security; that immediately after appellees got possession of said property it was levied upon by the sheriff of Martin county, by virtue of an execution issued from the Martin Circuit Court in favor of one Baker against said Hughs; that immediately thereafter they called upon appellant's assignor to secure said property for them, and were informed by said Hughs that said property belonged to Houghton and Moser by virtue of a mortgage executed to them by said Hughs prior to the sale of the property to appellee Anthony, and told said Anthony to give himself no further trouble concerning said prop-

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daughters each taking one-eighth, and the sons each three-eighths thereof, subject to the life estate of the widow; that the phrase "after the death of my wife" relates to the beginning of the enjoyment of the remainder, and not to the vesting of the estate, and that the provision in reference to the death of the children has reference to the death of a child during the lifetime of testator.

From Vigo Circuit Court; *J. E. Piety*, Judge.

Action by Richard J Barrett and others against Mary Burke and others. From a judgment in favor of plaintiffs, defendants appeal. *Reversed.*

H. S. Wallace, G. M. Crane, D. V. Miller and A. L. Miller, for appellants.

H. J. Baker and L. D. Leveque, for appellees.

ROBY, J.—Appellee Barrett brought suit for partition, alleging that he was the owner of five-eighths, and appellant Mary Burke was the owner of the remaining three-eighths, of the real estate in controversy. Appellant Burke answered by general denial, and filed two paragraphs of cross-complaint, in the second paragraph of which she alleged title specifically and asked that she be declared the owner of the thirty-three sixty-fourths, and the appellee Barrett the owner of thirty-one sixty-fourths, of the real estate; that her title be quieted; and that partition be decreed. Demurrers to the cross-complaints were sustained. Various pleadings were filed and rulings made thereon, which need not be noticed. Trial by court. Finding and judgment for appellee Barrett that the parties were the owners of the real estate as alleged in the complaint, and partition was ordered and made. Motions to modify the judgment and for a new trial overruled.

Error is assigned on the various rulings, but counsel agree that the only question involved is the construction of the will of John Barrett, deceased, and this is the only question argued in the respective briefs.

So far as material here, appellant Burke's second paragraph of cross-complaint in substance alleged that John

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Barrett, father of appellee Barrett and grandfather of appellant Burke, died in 1874, seized of the real estate in controversy, leaving a will which was duly probated and is now in full force and effect, the material provisions thereof being as follows, to wit: "Second. I give and bequeath to my wife Ellen Barrett, all my real estate during her life, subject to the support of my minor children, Jerry Barrett, Richard Barrett, Honora Barrett, and Ellen Barrett. I do hereby make the support and education of these my said children a charge upon my real estate until they shall become of age or shall have married. Third. After the death of my wife, I devise and bequeath my real estate to my said children in the following manner: (1) I give and devise to each of my said daughters one-eighth part of my real estate. (2) To each of my said sons I give and bequeath three-eighths of my real estate. The above bequests are subject to the life estate of my wife in the said real estate. Fourth. I do hereby nominate and appoint my beloved and faithful wife, Ellen Barrett, the sole executrix of this my last will and testament, and the guardian of my children, who may be minors at the time of my death. Fifth. If any of my said children should die before they would be entitled to shares given them under this will, then the survivors shall share equally the share of the one who is dead, unless the one who dies leaves lawful children surviving him or her."

John Barrett left surviving him his wife, Ellen Barrett, who lived until October, 1899; Jerry Barrett, who died in August, 1876, leaving no child or children, but leaving his mother Ellen Barrett, and Richard, Honora, and Ellen Barrett, his brother and sisters, as his only heirs; Honora Barrett, who married J. P. Burke, and died in 1889, leaving her husband and appellant Mary Burke, her only child, as her only heirs at law, and J. P. Burke died in 1895, leaving Mary Burke as his only heir at law; and Ellen Barrett, his daughter, who died in 1890, leaving no child or

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daughters each taking one-eighth, and the sons each three-eighths thereof, subject to the life estate of the widow; that the phrase "after the death of my wife" relates to the beginning of the enjoyment of the remainder, and not to the vesting of the estate, and that the provision in reference to the death of the children has reference to the death of a child during the lifetime of testator.

From Vigo Circuit Court; *J. E. Piety*, Judge.

Action by Richard J Barrett and others against Mary Burke and others. From a judgment in favor of plaintiffs, defendants appeal. *Reversed.*

H. S. Wallace, G. M. Crane, D. V. Miller and A. L. Miller, for appellants.

H. J. Baker and L. D. Leveque, for appellees.

ROBY, J.—Appellee Barrett brought suit for partition, alleging that he was the owner of five-eighths, and appellant Mary Burke was the owner of the remaining three-eighths, of the real estate in controversy. Appellant Burke answered by general denial, and filed two paragraphs of cross-complaint, in the second paragraph of which she alleged title specifically and asked that she be declared the owner of the thirty-three sixty-fourths, and the appellee Barrett the owner of thirty-one sixty-fourths, of the real estate; that her title be quieted; and that partition be decreed. Demurrers to the cross-complaints were sustained. Various pleadings were filed and rulings made thereon, which need not be noticed. Trial by court. Finding and judgment for appellee Barrett that the parties were the owners of the real estate as alleged in the complaint, and partition was ordered and made. Motions to modify the judgment and for a new trial overruled.

Error is assigned on the various rulings, but counsel agree that the only question involved is the construction of the will of John Barrett, deceased, and this is the only question argued in the respective briefs.

So far as material here, appellant Burke's second paragraph of cross-complaint in substance alleged that John

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Barrett, father of appellee Barrett and grandfather of appellant Burke, died in 1874, seized of the real estate in controversy, leaving a will which was duly probated and is now in full force and effect, the material provisions thereof being as follows, to wit: "Second. I give and bequeath to my wife Ellen Barrett, all my real estate during her life, subject to the support of my minor children, Jerry Barrett, Richard Barrett, Honora Barrett, and Ellen Barrett. I do hereby make the support and education of these my said children a charge upon my real estate until they shall become of age or shall have married. Third. After the death of my wife, I devise and bequeath my real estate to my said children in the following manner: (1) I give and devise to each of my said daughters one-eighth part of my real estate. (2) To each of my said sons I give and bequeath three-eighths of my real estate. The above bequests are subject to the life estate of my wife in the said real estate. Fourth. I do hereby nominate and appoint my beloved and faithful wife, Ellen Barrett, the sole executrix of this my last will and testament, and the guardian of my children, who may be minors at the time of my death. Fifth. If any of my said children should die before they would be entitled to shares given them under this will, then the survivors shall share equally the share of the one who is dead, unless the one who dies leaves lawful children surviving him or her."

John Barrett left surviving him his wife, Ellen Barrett, who lived until October, 1899; Jerry Barrett, who died in August, 1876, leaving no child or children, but leaving his mother Ellen Barrett, and Richard, Honora, and Ellen Barrett, his brother and sisters, as his only heirs; Honora Barrett, who married J. P. Burke, and died in 1889, leaving her husband and appellant Mary Burke, her only child, as her only heirs at law, and J. P. Burke died in 1895, leaving Mary Burke as his only heir at law; and Ellen Barrett, his daughter, who died in 1890, leaving no child or

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daughters each taking one-eighth, and the sons each three-eighths thereof, subject to the life estate of the widow; that the phrase "after the death of my wife" relates to the beginning of the enjoyment of the remainder, and not to the vesting of the estate, and that the provision in reference to the death of the children has reference to the death of a child during the lifetime of testator.

From Vigo Circuit Court; *J. E. Piety*, Judge.

Action by Richard J Barrett and others against Mary Burke and others. From a judgment in favor of plaintiffs, defendants appeal. *Reversed.*

H. S. Wallace, G. M. Crane, D. V. Miller and A. L. Miller, for appellants.

H. J. Baker and L. D. Leveque, for appellees.

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mixed with the whiskey, and could not be drunk as a beverage; Daniels immediately took said compound of whiskey and gum home, and delivered it to his mother; he bought said mixture in good faith to be used by his mother, and for her; he did not buy said mixture to be drunk as a beverage, and he did not drink any of it; when delivered by appellant to said David Daniels, it would take a few days for the whiskey thoroughly to dissolve the gum, and if the mixture were allowed to stand for a short time the particles of gum would sink to the bottom, and some of the whiskey might be poured off and drunk as a beverage; after the mixture was allowed to stand for a few days, the whiskey would thoroughly dissolve the gum, and the mixture could not be drunk at all, and could only be taken in milk; the mixture could not be drunk as a beverage at all if the mixture was shaken; Mrs. Daniels, mother of the prosecuting witness, had often purchased said mixture of appellant before that time to be used as medicine; Daniels had no prescription upon which he purchased said mixture of appellant.

Section 5276 Burns 1894 was amended in 1897 (Acts 1897, p. 253). The section before the amendment was as follows: "It shall be unlawful for any person, directly or indirectly, to sell, barter or give away, for any purpose of gain, any spirituous, vinous or malt liquor, in a less quantity than a quart at a time, without first procuring, from the board of commissioners of the county in which such liquor is to be sold, a license as hereinafter provided; nor shall any person, without having first procured such license, sell or barter any intoxicating liquor to be drunk, or suffer to be drunk in his house, outhouse, yard, garden or the appurtenances thereto belonging." By the amendment the sale of less than five gallons at a time was forbidden. The amendment made no other changes. The construction, therefore, given to the statute prior to the amendment must control.

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Criminal statutes are not always strictly construed. In *Hooper v. State*, 56 Ind. 153, in which the defendant was indicted for the unlawful sale of intoxicating liquor, the court, on page 156, say: "It is true that the act of March 17, 1875 (1 R. S. 1876, p. 869), to regulate and license the sale of intoxicating liquors, contains no exceptions, authorizing sales for medicinal or sacramental purposes. But it has been repeatedly held by this court, in construing similar statutes, that the courts will except, from the prohibition of the statute, *bona fide* sales for medicinal purposes. *Donnell v. State*, 2 Ind. 658; *Thomasson v. State*, 15 Ind. 449; *Jakes v. State*, 42 Ind. 473; *Ball v. State*, 50 Ind. 595.

In *Jakes v. State*, *supra*, the defendant was a druggist, and as such sold to the prosecuting witness one pint of whiskey. The witness testified that the whiskey was bought for medical purposes, and was so used. When called for, the appellant inquired for what purpose it was wanted, and was informed that it was wanted for medicinal purposes. It was held that the conviction could not be maintained, citing *Donnell v. State*, *supra*; *Thomasson v. State*, *supra*. See, also, *Elrod v. State*, 72 Ind. 292; *Nixon v. State*, 76 Ind. 524.

The term intoxicating liquors is defined by the statute (§7277 Burns 1901, §5313 Horner 1901) as any intoxicating liquor which is used or may be used as a beverage. The fact that when it stood for a time the whiskey might have been separated from the other ingredient of the mixture does not make the sale unlawful. The combination was sold as a medicine, and so taken. The good faith of the parties to the transaction is apparent and unquestioned. These facts bring the case within the foregoing decisions. The evidence is not sufficient.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

RUBLE v. BUNTING.

[No. 4,518. Filed November 24, 1903.]

SLANDER.—Charge of Forgery.—A charge of forgery is slanderous *per se*, and a complaint for slander in charging the forgery of a check is sufficient if the words used were calculated to cause the hearer to suspect that plaintiff was guilty of the crime. *p. 656.*

SAME.—Instruction.—In an action for slander in charging plaintiff with the forgery of a check, the place where the check was cashed was not of the essence of the charge, and it was not error to omit same from an instruction purporting to state the material averments of the complaint. *pp. 657, 658.*

SAME —Evidence.—In an action for slander in charging the forgery of a check, no error was committed in permitting plaintiff to give in evidence the check concerning which the charge of forgery was made, and to testify concerning it. *p. 659.*

From Knox Circuit Court; *O. H. Cobb*, Judge.

Action by John M. Bunting against Samuel P. Ruble. From a judgment for plaintiff, defendant appeals. *Affirmed.*

B. M. Willoughby and *J. M. House*, for appellant.

W. A. Cullop and *G. W. Shaw*, for appellee.

COMSTOCK, J.—Appellee (plaintiff below) brought this action against appellant for slander. The complaint was in four paragraphs. The trial was had on the second. The answer thereto was a general denial. A trial resulted in a verdict and judgment for appellee for \$1,000.

The assignment of errors questions the sufficiency of the said second paragraph and the action of the court in overruling appellant's motion for a new trial.

The paragraph in question, as originally certified in the transcript by the clerk of the Knox Circuit Court, is as follows: "The plaintiff, further complaining of the defendant, says: That he has heretofore borne a good name for honesty and integrity, and that the same was never questioned prior to the grievance hereinafter mentioned;

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that on the — day of October, 1901, in a certain conversation had and held with one James Sanders at the county of Knox in the State of Indiana, the defendant did speak of and concerning the plaintiff maliciously and falsely and following defamatory manner, to wit: Said Sanders spoke to said defendant and said, 'Bunting cashed that seven hundred dollar check which you gave him at Petersburg, and said Ruble then said he (the plaintiff meaning) had no check on me for \$700 or any other sum, and never did have one, and if he did have and cashed it he forged it'—thereby charging the plaintiff and intending to charge him with the crime of forgery, and that said Sanders so understood in said conversation that said Ruble was charging and intending to charge the plaintiff with the forgery of a check for \$700; that said defendant then and there knew that on the 19th day of December, 1892, he had given a check for \$700, payable to the plaintiff, on the First National Bank of Vincennes, Indiana, and that the same had been by said bank paid, and that the said defendant then and there knew that he was charging the plaintiff with the crime of forgery, and that said Sanders so understood him to be charging the plaintiff with the forgery of the check aforesaid; that on account of the defendant using said false and defamatory language aforesaid, he has suffered greatly in his reputation for honesty and integrity, has been damaged in his business, has been greatly humiliated, has suffered both in mind and body, and damaged in the sum of \$5,000." The paragraph was incorrectly certified. Upon proper application the phrase "following defamatory manner" was changed to "following defamatory matter."

Appellant designates as a defect in the complaint that it does not allege that the slanderous words were either spoken, published, or written by the defendant; the allegation is that the defendant spoke "of and concerning the plaintiff, maliciously and falsely and following defama-

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tory manner, to wit." In other words, that it does not purport to give the slanderous words, but only the manner in which they were spoken. The language quoted originally appeared in the transcript. As corrected, the objection does not apply.

The other objection to the paragraph is that whatever was said by the defendant was said in reference to a check for \$700 alleged to have been given by Ruble to Bunting, at Petersburg; and that the complaint should also allege that the defendant at some time gave the plaintiff a check for \$700 at Petersburg, without such averment the charge could not have been slanderous. The charge is that the check was given on the First National Bank of Vincennes. The place where given is not charged, nor is it material. The controlling facts were that it was given and the circumstances and the conditions set out and the charges made were with reference to it. The gist of the charge is that appellee forged a check for \$700 on the First National Bank of Vincennes, Indiana, in the name of the appellant.

A charge of forgery is slanderous *per se*. Section 375 Burns 1901 provides: "In an action for libel or slander it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove, on the trial, the facts, showing that the defamatory matter was published or spoken of him." A strict affirmative charge of forgery is not necessary. If the words used are calculated to cause the hearer to suspect that the plaintiff was guilty of the crime, they are actionable. *Drummond v. Leslie*, 5 Blackf. 452; *Seller v. Jenkins*, 97 Ind. 430; *DePew v. Robinson*, 95 Ind. 109, 111; *Branstetter v. Dorough*, 81 Ind. 527, 529; *Hotchkiss v. Olmstead*, 37 Ind. 74, 82; *O'Conner v. O'Conner*, 24 Ind. 218, 221; *Harrison v. Findley*, 23 Ind. 265, 271, 85 Am. Dec. 456; *Proctor v. Owens*, 18 Ind. 21, 22, 81 Am. Dec. 341.

Appellant claims that the verdict is not sustained by

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sufficient evidence, upon the ground that it wholly fails to show that the said slanderous words were spoken to James Sanders. To quote from appellant's brief: "James Sanders does not say that the words were addressed to him, or spoken in a conversation with him." The record shows that James Sanders, being recalled as a witness, testified as follows: "Were you at the trial between Bunting and Ruble? A. Yes, sir. Did you see John T. Goodman and S. P. Ruble in the side room in the court-house that day? Yes, sir. Did you have a conversation with S. P. Ruble in the side room that day? A. Yes, sir. You may state what he said to you concerning John M. Bunting and the \$700 check there. A. Well, as well as I can recollect on the subject, him and Mr. Bunting was in a quarrel or quarreling in there. Go on and state what he said to you on that subject. A. Well, there was two or three in there, and he says if Bunting ever had a check on him for \$700 he forged it. Who else was in the room at that time? A. John T. Goodman. Anybody else? A. Tom Bunting. That was on the day of the trial between S. P. Ruble and the Buntings in January, 1901? A. Yes, sir, in the evening about 3 or 4 o'clock, on the day of the trial. Where did it occur? A. In this cloakroom out here [indicating]." His testimony was corroborated by that of John T. Goodman and Thomas Bunting.

Complaint is made of instruction number four given by the court of its own motion, upon the ground that it does not correctly state the issues formed on said second paragraph. Said instruction is as follows: "The said second paragraph of plaintiff's complaint substantially avers that the defendant falsely and maliciously slandered plaintiff by saying of and concerning him, to one James Sanders, that he (the plaintiff Bunting meaning) had no check on him (Ruble) for \$700 or any other sum, and never did have one, and, if he did have and cashed it, he forged it, when in fact said defendant had given said plaintiff a

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check for \$700 on the First National Bank of Vincennes, Indiana, and that said bank had paid said check, and that plaintiff on account thereof suffered greatly in his reputation for honesty and integrity, and has been greatly humiliated thereby, and suffered in mind and body, and thereby has been damaged in the sum of \$5,000." It is argued that as the complaint charges the speaking of the words in reference to a check given by the defendant at Petersburg, and the instruction states the allegations of said paragraph were in reference to a check given on the First National Bank of Vincennes, the issues were not fully and correctly stated. The objection to the instruction can not be sustained. The charge was forging a check on the First National Bank of Vincennes. Appellant said that he had given no such check, and if the appellee had such check he had forged it. Where the check was cashed was not of the essence of the charge.

Instruction number two, given at the request of appellee, is claimed to be erroneous, because, while undertaking to set out the material facts necessary to maintain the action, it does not set out all of them. The instruction makes no reference to the fact that the alleged slanderous words were spoken concerning a check alleged to have been given by the defendant to the plaintiff at Petersburg. Said paragraph may fairly bear the construction of charging that the check was cashed at Petersburg.

The third, fourth, fifth, and sixth instructions, given at the request of the plaintiff, are objected to as each assuming that the fact of the existence of and the giving of a certain check for \$700 was established. The language of said third instruction is: "In determining whether the said defendant Ruble said to James Sanders that the plaintiff forged the seven hundred dollar check you may take into consideration the testimony of other persons, if any such there were who were present at the time and heard what was said, if the evidence shows any-

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thing was said." The fourth, fifth, and sixth each began: "If you find from the evidence that the defendant," etc.

The court permitted plaintiff to give in evidence the check dated December 19, 1892, on the First National Bank of Vincennes, signed by S. P. Ruble, and payable to John M. Bunting, and to testify concerning the check. It was the check concerning which the charge of forgery was made, the check which the appellant said that he had never given the appellee. It had been cashed at Petersburg by appellee, and sent from Petersburg to Vincennes for collection. Appellant admitted its execution after its introduction in evidence. The evidence was proper.

The court permitted the plaintiff, over the objection of the appellant, to introduce the record entry of a judgment in the case of Ruble (appellant here) v. John and Thomas S. Bunting. The giving of the check was incident to a partnership matter with which the appellee and appellant were concerned in 1892. In 1901 a trial was had in which Ruble was plaintiff and the Buntings were defendants, and judgment was rendered in appellant's favor. The subject of the check came up in evidence, and Ruble denied having given it. On the day of the trial, in the cloakroom of the court-house (heretofore referred to by witness), the appellant first made, as claimed, the charge of forgery. A number of witnesses testified in the case at bar concerning the testimony of Ruble in the former trial. The introduction of the record of this judgment is the one of which appellant complains. The record entry of the judgment would be competent, at least, to show the date. It was not error to admit it for that purpose. For any other purpose it was immaterial, but we can not say that it was harmful. There was no error in permitting proof of appellant's testimony, on the former trial, denying the giving of the check.

We find no error for which the judgment should be reversed. Judgment affirmed.

GEORGE ET AL. v. HURST.

[No. 4,582. Filed November 24, 1903.]

EVIDENCE.—*Hearsay.*—In an action on a promissory note, defended on the ground that plaintiff was not the owner of the note, a letter written to defendants by a third person, tending to show that he was the owner of the note, was inadmissible. pp. 662, 663.

WITNESSES.—*Privileged Communications.*—*Attorney and Client.*—Statements made by defendant to her attorney in reference to the ownership of a note are privileged, under subdivision three of §505 Burns 1901, and the court erred in requiring defendant, over objection, to testify to such statements in an action on the note. pp. 663, 664.

From Sullivan Circuit Court; *O. B. Harris*, Judge.

Action by Dennis Hurst against Flora George and another. From a judgment for plaintiff, defendants appeal. *Reversed.*

S. R. Hamill, A. J. Kelley, G. W. Buff and *W. P. Stratton*, for appellants.

S. A. Hughes, G. D. Caldwell, J. O. Piety, C. D. Hunt, J. T. Hays and *W. H. Hays*, for appellee.

COMSTOCK, J.—This action was instituted in the Vigo Circuit Court by the appellee against the appellants upon a promissory note for \$450 claimed to have been executed by appellants to the appellee. To the complaint the appellant Flora George filed an answer in two paragraphs; in the first pleading want of consideration; in the second *non est factum*. The appellant Alice Hunter filed her separate answer in three paragraphs; in the first pleading want of consideration; in the second that she executed the note as surety for her codefendant Flora George, and received no consideration therefor, and that at the time she so executed said note she was, and still is, a married woman; in the third *non est factum*. Appellee replied to the separate answer of Flora George by a general denial, and to the separate answer of Alice Hunter he filed two par-

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agraphs of reply. The first is a general denial. In the second he admits that at the time said Alice Hunter signed the note sued on she was, and still is, a married woman, but that the note was executed as evidence of a loan of money made by him and paid to her at the time for her own use and benefit.

At this stage of the proceedings the venue was changed from the Vigo Circuit Court to the Sullivan Circuit Court in which last-named court the appellants filed a joint answer, in which they alleged, in substance, that at the time they signed the note one Wright L. Kidder was alive; that a note was signed by the appellants, with the name of the payee left blank, at the request of the said Wright L. Kidder; that said note was executed in consideration of the sum of \$450, money advanced to the appellant Flora George by the said Wright L. Kidder; that said Flora George was principal in said note, and the said Alice Hunter surety thereon; that subsequent to the signing of said note the name of appellee was written in said note without the knowledge or consent of the appellants. The said joint answer further alleges that on the 8th day of August, 1901, Wright L. Kidder departed this life, leaving as his only heirs at law his widow, Elizabeth Kidder, and two sons, Frank L. and Edson W.; that Edson W. and Elizabeth Kidder were, by the Vigo Circuit Court, duly appointed administrator and administratrix of the estate of said Wright L. Kidder; that said estate has been finally settled, and the administratrix and administrator finally discharged; that all the debts of said estate have been fully paid; that on the 11th day of January, 1902, Edson W. Kidder departed this life, leaving as his only heirs at law his widow, Kate Kidder, and two children, Katherine and Margaret; that Kate Kidder has been duly appointed administratrix of the estate of Edson W. Kidder, and said estate is now *pending* settlement in the Vigo Circuit Court. Appellee replied to the joint answer by general denial. A

trial by the court without the intervention of a jury resulted in a judgment in favor of the appellee for \$624.80. The overruling of appellants' motion for a new trial is the only error assigned.

The first reason for a new trial discussed is the exclusion as evidence of an envelope addressed to Flora George, Indianapolis, Indiana, with postmark dated June 27, 1897; the second, exclusion of the letter identified by appellant as the one received by due course of mail, and enclosed in said envelope addressed to her at Indianapolis, at which place she was then residing. It appears from the evidence that appellee introduced appellant George to one Wright L. Kidder, by whom he had been formerly employed. The testimony tends strongly to show that subsequently, for a number of years, improper relations existed between said Kidder and said George. The testimony also tends strongly to show that in delivering the money for which the note in suit was executed, appellee was acting as the agent of Kidder and retained \$50 out of the \$450 furnished by Kidder for procuring the money. Appellant George testified that appellee told her that Kidder was going to get her the money; that subsequently it was done, and the note which appellee testified had been filled out by Kidder was signed; that when the note was signed it did not contain the date of payment nor the name of the payee. Appellant Hunter testified that she could not read nor write. She signed the note with a cross mark. They both testified that when the note was presented for signature appellee told them it was not necessary that it should have the time of payment or the name of the payee, that he only wanted their signatures that Mr. Kidder might know that he (appellee) had delivered the money. Appellants testified that appellant Hunter got no part of the money, and signed the note as surety for appellant George. Appellants were married women. There was a conflict in the testimony as to the condition of the note when it was

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signed, as to the amount of the money paid over, and to whom it was delivered. Appellants testified that the money was delivered to Mrs. George, appellee, that \$200 of it was given to Mrs. George and \$200 to Mrs. Hunter. Upon appellee's own testimony appellant Hunter was surety for \$200 of the consideration of the note. The letter sought to be introduced was not signed, but Mrs. George testified that the address on said envelope was in the handwriting of Kidder. The letter tended to show that the writer had furnished the money, and was the owner and holder of the note in question.

Appellants contend that the letter should have been admitted in evidence as "a declaration in disparagement of the title of the declarant" and for the purpose of showing that appellee was the agent of Kidder. We think it was not competent for either reason. Kidder was not a party to the action, and appellee was not claiming under him. The letter amounted to no more than a statement of a third person made out of court, not under oath, and not in the presence of appellee. It was hearsay.

Exceptions were taken to the following questions put to the appellant George, on cross-examination, while testifying as a witness: "Will you tell the court whether or not before that time, December 12, 1901, you had told your attorneys that this note belonged to Kidder? Did you tell your attorneys this note belonged to Kidder before you swore to this answer here? What is your best judgment as to whether you told your attorneys Kidder owned this note before or after you signed this affidavit? Did you tell your attorneys this was Kidder's money before you had signed that answer? Did you tell the attorneys all about it before you filed the answer?" As a general rule the communications of a client to his attorney are privileged. The evidence in the case at bar does not bring it within the exception. *Reed v. Smith*, 2 Ind. 160; *Borum v. Fouts*, 15 Ind. 50; *Bowers v. Briggs*, 20 Ind.

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139; *Oliver v. Pate*, 43 Ind. 132; *Penn, etc., Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769. Section 505 Burns 1901, subdivision 3, provides that attorneys, as to confidential communications made to them in the course of their professional business and as to advice given, shall not be compelled to testify. The same rule has been applied where the client was on the witness-stand. *Bigler v. Reyher*, 43 Ind. 112; *Hemenway v. Smith*, 28 Vt. 701; *Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 406. See, also, cases collected in footnote to *O'Brien v. Spaulding*, 66 Am. St. 213; *Citizens' St. R. Co. v. Shepherd*, 30 Ind. App. 193, and cases cited; *Harris v. Rupel*, 14 Ind. 209; *Excelsior Mut. Aid Assn. v. Riddle*, 91 Ind. 84; *Penn, etc., Ins. Co. v. Wiler, surpa*. Under the foregoing, and many other cases that might be cited, the testimony was incompetent.

The judgment is reversed, with instructions to sustain the motion for a new trial.

BLAIR v. WHITTAKER.

[No. 4,655. Filed November 24, 1903.]

QUIETING TITLE.—*Notice of Vendee's Agent as to Former Conveyances.*—*Sufficiency of Evidence.*—In a suit to quiet title, the evidence showed that the real estate in controversy was a part of a tract of land, a life estate in which had been devised by testator to his wife and the fee to his children; that the children executed to plaintiff a deed which after delivery was returned to the justice of the peace before whom it had been acknowledged, and by whom an important correction was made; that before the deed was returned and recorded, and more than forty-five days after its execution, the grantors gave a warranty deed for the same tract of land to one Stewart who executed and delivered to plaintiff a warranty deed therefor, which latter deed was lost and never recorded; that thereafter the testator's said children conveyed to defendant adjoining lands, and unintentionally the land in controversy was included. Conversations with defendant's agents at the time of the last conveyance, admitting knowledge of the former conveyances of the land by the same grantors, were introduced in evidence, but such conversations were denied by the agents. *Held*,

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that the trial court was warranted in finding that defendant's agents had notice of the prior conveyances before the transfer to defendant, and that defendant took his conveyance charged with knowledge of plaintiff's right under the unrecorded deeds. pp. 666-669.

PRINCIPAL AND AGENT.—*Notice to Agent.*—Notice to an agent for the purchaser of real estate is notice to the purchaser. p. 670.

NOTICE.—*Putting Party on Inquiry.*—Whatever puts a party on inquiry amounts to notice. p. 671.

DEEDS.—*Recording.*—*Validity.*—The recording of a deed is not essential to its validity as between the parties. p. 671.

SAME.—*Disaffirmance by Infant Feme Covert.*—Under §3364 Burns 1901, a married woman can not disaffirm a conveyance made during minority, until she has restored to her grantee the full consideration received. p. 672.

VENDOR AND PURCHASER.—*Possession of Land.*—*Notice.*—Actual possession of lands under claim of title is sufficient notice of such claim to put others on inquiry as to the existence and nature of the claim. p. 673.

From Superior Court of Vanderburgh County; *J. H. Foster*, Judge.

Suit by Florence Whittaker against Samuel D. Blair to quiet title to real estate. From a judgment for plaintiff, defendant appeals. *Affirmed.*

A. P. Twineham and *C. M. McRoberts*, for appellant.

W. E. Stillwell, *Henry Kister* and *T. W. Cullen*, for appellee.

WILEY, P. J.—Suit by appellee to quiet title. The cause originated in the Gibson Circuit Court, where a trial resulted in her favor. Appellant took a new trial, as of right, under the statute, and thereupon the venue was changed to the court below, where it was again tried with a like result. Appellant moved for a new trial on the ground that the finding was contrary to law, and was not supported by sufficient evidence, and for alleged error in admitting certain evidence.

Appellant grounds his right to a reversal solely on the insufficiency of the evidence.

Appellee claims title by virtue of deeds which were not recorded within the statutory period, but avers in her com-

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plaint that appellant purchased the real estate with full knowledge of the unrecorded conveyances to her while she was in possession.

In view of the facts as disclosed by the evidence it is important to state the material averments of the complaint. It is alleged that on February 19, 1897, Henry Robinson, John Robinson, and Julia A. Jordon were the owners of the undivided two-thirds of the real estate in controversy, which on said day was conveyed to appellee; that said deed was executed before one Gilmore, a justice of the peace; that it was sent to the recorder's office to be recorded; that the recorder returned it to appellee to be corrected; that she immediately delivered it to said Gilmore for correction; that while in his possession he died, and that after his death said corrected deed was found, dated February 19, 1897, but not until after appellants had obtained a deed to the same land from a part of the said parties; that immediately after the purchase of said real estate, appellee took possession of it; that she has ever since remained in possession and occupied it, and that she has made valuable improvements thereon; that on the 26th day of June, 1897, Julia A. Jordon, Mack Lucas, and Julia Lucas, formerly Julia Robinson, were the owners of the other undivided one-third interest in said real estate, and on said day conveyed the same to one William M. Stewart, who conveyed the same to appellee on or about the 1st of July, 1897; that said deed had been lost without any fault of appellee and can not be found; that she immediately took possession of said one-third interest in said real estate so conveyed, and has remained in possession ever since; that before said deed was corrected as aforesaid, and after appellee had purchased all of the land in controversy, appellant quietly and secretly obtained, with full knowledge of appellee's rights therein, a warranty deed from the said John and William Robinson, Mack Lucas, and Julia Lucas to said real estate, together

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with other lands in the immediate vicinity thereof, subject to the life estate of said Julia A. Jordon, and had such deeds properly recorded. It is averred that said deeds to appellant are a cloud upon her title, etc. Both parties claim title by purchase from the heirs and devisees of one William J. Jordon, deceased.

The decision of the case rests upon the application of the law to the following facts: William J. Jordon died, testate, the owner of several tracts of real estate, including the forty acres in dispute. By his will he bequeathed to his wife, Julia A. Jordon, in fee, certain of his real estate, and gave her a life estate in all of his lands. The lands in which he gave a life estate to his wife at her death vested in fee in William H. Robinson, John Robinson, and Julia Robinson, who were children of the testator's sister. February 19, 1897, Julia A. Jordon, William H. and John Robinson conveyed by warranty deed to appellee the undivided two-thirds of the real estate in question. That deed was executed before one Gilmore, a justice of the peace, and was tendered to the recorder to be recorded within the statutory period, but he refused to record it because of some defect. It was thereupon returned to the justice of the peace before whom it had been acknowledged for correction; was, in fact, corrected, but never recorded until August 27, 1900. June 26, 1897, Julia A. Jordon, Mack Lucas, and Julia Lucas, *nee* Robinson, conveyed by warranty deed to William M. Stewart all their interest in and to the forty-acre tract in controversy. This deed was not recorded, and when it was executed Julia Lucas was a minor, while her husband was over the age of twenty-one years. About July 1, 1897, William M. Stewart conveyed the same land to appellee, which deed was lost, and hence not recorded. July 31, 1897, John Robinson conveyed to appellant all of his interest in the real estate, subject to the life estate of Julia A. Jordan. August 2, 1897, William H. Jordan made a like conveyance to ap-

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pellant. December 27, 1897, after Julia Lucas had arrived at full age, she conveyed—her husband joining her—to appellant all the interest Julia A. Lucas had in and to the real estate under the will of William J. Jordan, subject to the life estate of his widow. These last three deeds were duly recorded. When the deeds above specified were executed to Julia A. Lucas, she took possession of the real estate, made valuable improvements thereon, and has remained in possession ever since. Appellant owned other real estate in the same vicinity, and he and his son, who was his agent in purchasing the interest that the Robinson boys and their sister had in the real estate under the will of Jordan, were frequently in the neighborhood, and, to our judgment, the evidence clearly shows that they knew appellee was in possession of the real estate here in dispute. On the day that Mrs. Lucas and her husband executed their deed to appellant, she re-acknowledged the deed which she had made to Stewart.

These facts all stand unchallenged, and the disputed question of fact is, did appellant have notice or knowledge of the several conveyances from the Robinsons and Mrs. Lucas to appellee before he received his deeds of conveyance from them? A mixed question of law and fact also arises on appellant's assumption that the conveyance of Mrs. Lucas to him after she became of age was a disaffirmance of her former conveyance to Stewart. We shall first consider the disputed question of fact as to appellant's knowledge. The evidence does not bring notice to appellant himself, and if he had notice it was through his agents. Both of the Robinson boys were ignorant and illiterate. They could neither read nor write, and their signatures to all of the deeds are by mark. Their sister, Mrs. Lucas, could barely write her name and read. The evidence does not disclose any dishonesty on their part, for it is not pretended that they sold their interests in this land to appellee, and afterward tried to profit dishonestly by again selling

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it to appellant. On the contrary, the evidence shows that in their conveyances to appellant they did not know this particular tract was included, and, in fact, did not intend to include it. In the negotiations leading up to and including the execution of deeds to appellant and the payment of the money, John Blair, a son of appellant, and one Edward Moore, were representing him as his agents. The evidence establishes beyond all question such agency. On the day that William H. Robinson executed his deed to appellant, Guy Whittaker, husband of appellee, had a conversation with John Blair, in which he told him of the trade by which he (meaning his wife) had bought the land; that the deed had not been recorded, and that John Blair said to him that he understood that trade, and understood that they had bought the land; that Whittaker said to him he was afraid there would be trouble about it, and he replied there would not be; that he put that tract in the deed for fear there should be a mistake; that he wanted to wait until he bought the next heir, Julia Lucas, and then he would deed back to Whittaker. John Robinson, who executed his deed to appellant on July 31, 1897, testified that he told John Blair before the deed was made that he had deeded the forty acres in controversy to appellee.

Julia Lucas testified that the real estate which she conveyed to Stewart was not to be included in what she deeded to appellant. The deed she made to appellant was not read over to her, and, in the light of her evidence, it is clear that she had not intended to include the tract in controversy. This fact may become important when we come to consider the question of her disaffirmance of the Stewart deed, as claimed by appellant.

John Blair admitted in his evidence that John Robinson told him that the forty acres he deeded to appellee was not to be included in appellant's deed, but says that he told him that after the deed was executed to his father, and after the money was paid.

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Ed Moore testified in substance that he knew that John Robinson had deeded his interest in this particular forty-acre tract to appellee, and that, as he was selling his interest in the Jordan lands to appellant, the latter conveyance would not affect the former deed. The evidence also clearly shows that Moore knew that John Robinson had deeded to appellee his interest in the forty-acre tract adjoining her place.

Mack Lucas testified that, before he and his wife and the Robinsons made their deeds to appellant, he told John Blair that his wife had deeded her interest in the land to Stewart, and that John replied: "He didn't care much about it. All he cared for was the hill land." This evidence is not contradicted, except in a general way, and appellant's agents, his son and Moore, testified, in substance, that they had no knowledge of the several transfers to appellee until after the conveyances to appellant.

From this evidence the trial court was fully warranted in finding, as it must have found, that appellant's agents had notice of the several conveyances to appellee before they made the conveyances to appellant. The general rule is that notice to an agent is notice to the principal of any matter that is within the scope of the agency. *Marion Mfg. Co. v. Harding*, 155 Ind. 648; *Supreme Court, etc., v. Sullivan*, 26 Ind. App. 60.

It has many times been declared that in the relation of the principal and the third party the rule is that notice to an agent is notice to the principal, if the agent comes to the knowledge of facts while he is acting for the principal. Huffcut, *Agency* (2d ed.), §§141, 142. In 1 Am. & Eng. Ency. Law (2d ed.), 1144, it is said: "It may be stated as a broad proposition of law that notice to an agent is, in contemplation of law, notice to the principal." See, also, 1 Am. & Eng. Ency. Law, 419. This doctrine has been recognized in repeated decisions both in England and most of the states of the Union. The same rule prevails

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in the federal courts. We shall not cite the many cases so holding, but reference is here made to them in the above cited volumes of the Am. & Eng. Ency. of Law.

In Illinois it was held that if an agent has notice at the time of his purchase for his principal of the equitable rights of another, and of the claim of the latter to have previously purchased the subject-matter of the sale, such fact would be notice to the principal. *Whitney v. Burr*, 115 Ill. 289.

In Missouri it was held that he who takes with notice of an equity takes subject to the equity. This is not necessarily positive information brought directly home, but a fact that would put an ordinarily prudent man on inquiry. Also that the party will be as much bound by notice given to his agent as if it was given to himself, personally. *Meier v. Blume*, 80 Mo. 179.

The rule is that whatever puts a party on inquiry amounts, in law, to notice. Private inquiry would lead to the knowledge of the requisite fact by the exercise of diligence of an ordinarily prudent man. *Indiana, etc., R. Co. v. McBroom*, 114 Ind. 198; *Wilson v. Hunter*, 30 Ind. 466; *Case v. Bumstead*, 24 Ind. 429; 16 Am. & Eng. Ency. Law, 792.

Under the rules stated, and the facts as disclosed by the record, it is evident that appellant took the conveyances from John and William Robinson and Mrs. Lucas, charged with the knowledge of appellee's right under her unrecorded deeds.

The recordation of a deed is not essential to its validity as between the parties, and they are bound by it in the absence of such recordation. If it is recorded, it is considered notice to all the world, and if it is not recorded it can not prevail against a subsequent innocent purchaser without notice. Tiedeman, *Real Property*, §816. In 3 Washburn, *Real Property* (5th ed.), 343, the rule is stated as follows: "The proposition may be regarded as applica-

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ble to all the states, that actual notice has the same effect in determining the right of precedence between parties claiming under different deeds from the same grantor as the record thereof regularly made would itself have. * * * If the grantee in the second deed which is recorded knew of a prior unrecorded deed when he took it, the latter will take precedence of the former, though the real purchaser, and the one who paid the consideration, and had the deed made to such grantee, did not know of the prior deed." See, also, *Murphy v. Nathans*, 46 Pa. St. 508; *Givan v. Dow*, 7 Blackf. 210.

It is urged by appellant that Julia Lucas disaffirmed her deed to Stewart after she arrived at her majority by the execution of her deed to appellant. True, the rule is that one who executes a deed during her or his minority may, upon arrival at majority, under certain conditions, disaffirm said deed; and the execution of a deed to another after such majority is in law a disaffirmance. *Losey v. Bond*, 94 Ind. 67; *Riggs v. Fisk*, 64 Ind. 100.

In this case, however, under the evidence, the subsequent conveyances by Mrs. Lucas to appellant after her majority would not amount to a disaffirmance, for two reasons: (1) Because it is shown that she did not understand or intend that the land in controversy was to be included in the deed to appellant; and (2) she specifically affirmed the conveyance to Stewart after her majority by re-acknowledging the deed to him. Again it is provided by statute that in "all sales by an infant *feme covert* of lands belonging to her, and in which sales and conveyances her husband has joined, he being of full age, said infant shall not be permitted to disaffirm said sale, until she shall first restore to the person owning said real estate the consideration she received for said land." §3364 Burns 1901. No pretense is made that Mrs. Lucas restored, or offered to restore the consideration she received from Stewart. There was no disaffirmance in this case.

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There is another reason why appellant was put upon inquiry, and hence is not in a position to take advantage of appellee's unrecorded deeds. The latter was in possession under a claim of title. It is the rule both in this country and in England that actual possession of lands under a claim of title is sufficient notice of such claim to put others on inquiry as to the existence and nature of the claim. *Dyer v. Eldridge*, 136 Ind. 654, 658; *Jeffersonville, etc., R. Co. v. Oyler*, 60 Ind. 383; *Tuttle v. Churchman*, 74 Ind. 311; *Jeffersonville, etc., R. Co. v. Oyler*, 82 Ind. 394; *Campbell v. Indianapolis, etc., R. Co.*, 110 Ind. 490; 4 Cent. L. J. 122; 16 Am. & Eng. Ency. Law, 800; *Vaughn v. Tracy*, 22 Mo. 415.

While the record may fail to show by positive and direct evidence that appellant or his agents knew appellee was in possession, a reasonable inference from all the facts and circumstances, leads conclusively to that result. It is the general rule in the United States that possession of the grantee under a prior recorded deed is constructive notice of title under which he holds. Tiedeman, Real Property, §816 *et seq.*, and authorities there collected and cited.

What we have said disposes of all questions discussed by counsel adversely to appellant, and the judgment is affirmed.

DUNN ET AL., EXECUTORS, v. DILKS, EXECUTRIX.

[No. 4,683. Filed November 24, 1903.]

JUDGMENTS.—*Revival.*—*Merger.*—*Scire Facias.*—Where judgment was rendered on a note and such judgment revived by writs of *scire facias*, the note was merged in the original judgment, and that judgment was merged into the succeeding ones. p. 678.

SAME.—*Foreign Judgments.*—*Enforcement.*—*Scire Facias.*—A suit can not be maintained in this State upon a judgment rendered in Pennsylvania upon returns of *nihil* to two successive writs of *scire facias* issued to revive the judgment, where the defendant at the time of the issuing of the writs was a resident of Indiana, and out of the jurisdiction of the court that rendered the judgment. pp. 674-685.

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From Marion Circuit Court (10,452); *H. C. Allen*, Judge.

Action by R. W. Dunn and others, executors of the estate of John S. McCray, deceased, against Eleanora Dilks, executrix of the will of John H. Dilks, deceased. From a judgment in favor of defendant, plaintiffs appeal. *Affirmed.*

A. C. Ayres, A. Q. Jones, J. E. Hollett, J. H. Osmer, A. R. Osmer, N. F. Osmer and G. W. Blain, for appellants.

F. E. Gavin, T. P. Davis and J. L. Gavin, for appellee.

WILEY, P. J.—A demurrer for want of sufficient facts was sustained to appellants' amended complaint, and, they refusing to plead over, judgment was rendered against them for costs. Sustaining the demurrer to the amended complaint is assigned as error.

The complaint, together with the exhibits and exemplifications, is voluminous, but the facts as stated in the complaint upon which the decision must rest may properly be stated in few words. On August 11, 1871, the deceased, John H. Dilks, and Robert Sutton executed their joint note, payable to James S. McCray, now deceased, due ninety days after date, for \$1,025. This note contained the following clause: "And we empower any attorney of record in this commonwealth, or elsewhere, to appear for us and confess judgment against us for the above sum, together with the ten per cent. additional, with cost of suit, release of errors, and without stay of execution."

The note shows on its face that it was executed in the commonwealth of Pennsylvania. At the time of the execution of said note there was, and ever since has been, in force in the commonwealth of Pennsylvania the following statute: "It shall be the duty of the prothonotary of any court of record within this commonwealth on the application of any person being the original holder, or assignee of such holder, of a note, bond or other instrument of writing

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in which judgment is confessed, or containing a warrant for an attorney of law or other person, to confess judgment, to enter judgment against the person or persons who executed the same, for the amount which, from the face of the instrument, may appear to be due, without the agency of an attorney, a declaration filed with such stay of execution as may be therein mentioned for the fee of \$1, to be paid by the defendant party entering in his docket the date and tenor of the instrument of writing on which the judgment may be filed, which shall have the same force and effect as if the declaration had been filed, and judgment been confessed by an attorney or judgment been obtained in open court, and in term time."

The note referred to was not paid at maturity, and on the 20th day of August, 1872, the holder of the note presented it to a prothonotary of the court of common pleas of Crawford county, in the commonwealth of Pennsylvania, and such prothonotary entered judgment thereon against the makers. On the 11th day of October, 1876, the judgment so entered had not been satisfied, and on that date it was transferred to the court of common pleas of Venango county in said state, in accordance with the statute then in force, which statute is as follows: "In addition to the remedies now provided by law, hereafter any judgment in any district court, or court of common pleas of Pennsylvania, may be transferred from the court in which they are entered, to any other district court, or court of common pleas in this commonwealth, by filing of record in said other court a certified copy of the whole record in the case. And any prothonotary receiving such certified copy of record, in any case in which judgment has been entered by another court or in another court by transcript from justices of the peace, shall file the same, and forthwith transcribe the docket entry thereof into his own docket; and the case may then be proceeded in and the judgment and costs collected by executions, bill of discovery, or attach-

ment, as prescribed by the act entitled 'An act relating to executions,' passed the 16th day of June, 1836; and as to lien, revivals, executions, and so forth, it shall have the same force and effect, and no other, as if the judgment had been entered, or the transcript been originally filed in the same court to which it has thus been transferred."

On the 11th of August, 1871, there was in force in the commonwealth of Pennsylvania, and ever since has been, the following statute: "Upon all judgments already entered, or which may be hereafter entered in any court of record within this commonwealth, it shall be lawful to sue out a writ of *scire facias* to revive the same according to the provisions of this act, and the act of which this act is a supplement, or to revive the same by agreement of the parties filed and docketed as aforesaid, notwithstanding the day of the payment of the money for which such judgment may be rendered, or any part thereof, may not have arrived at the time of suing out such writ of *scire facias*, or the revival of such judgment by agreement, as aforesaid, and notwithstanding any other condition or contingency may be attached to such judgment or any execution may have been issued to such judgment; and moreover, no order or rule of court, or any other process or proceeding thereof, shall have the effect of obviating the necessity of the revival, in manner herein prescribed, of any judgment whatever."

On March 7, 1882, in accordance with the provisions of the statute last cited, a writ of *scire facias* was issued by the prothonotary of the court of common pleas of Venango county, Pennsylvania, to revive said judgment and placed in the hands of the sheriff of said county for service. Said *scire facias* writ was returned, indorsed by the sheriff that the defendants could not be found. Thereupon, and in accordance with the statute then in force in said state, proclamation was made by the court crier of said court, calling upon all persons interested to show cause why such judgment

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should not be revived. The statute to which reference was last made is as follows: "All such writs of *scire facias* shall be served upon the *terre* tenants, or persons occupying the real estates bound by the judgments; and also where he or they can not be found, on the defendant or defendants, his or their *feoffee* or *feoffees*, or on their heirs, executors, or administrators of such defendant or defendants, his or their *feoffee* or *feoffees*, and where the land or estate is not in the immediate occupation of any person, and the defendant or defendants, his or their *feoffee* or *feoffees*, or their heirs, executors, or administrators can not be found, proclamation shall be made in open court, at two succeeding terms, by the crier of the court in which such proceedings may be instituted, calling upon all persons interested to show cause why such judgment should not be revived. And no proof of the due service thereof, or no proclamation having been made in the manner hereinbefore set forth, the court from which the said writ may have issued shall, unless sufficient cause to prevent the same is shown, at or before the second term, subsequent to the issue of the writ, direct and order the revival of any such judgment during another period of five years against the real estate of such defendant or defendants. And proceedings may, in like manner, be had again to revive any such judgment at the end of the said period of five years, and so from period to period as often as the same may be found necessary."

At the time said *scire facias* writ was returned indorsed "Not found" as to the defendants, nor at any time since, has anyone interposed any objection to the revival of said judgment.

May 2, 1883, a second *scire facias* writ was issued for the revival of said judgment, which was also returned "Not found" as to the defendants. Proclamation was again made by the court crier, and no one appeared, nor has since appeared, and interposed any objection to the revival of the judgment. September 10, 1883, judgment was entered and

liquidated in said court of common pleas against the makers of said note in the sum of \$1,763. May 31, 1899, James S. McCray, the original payee of said note, died, and the appellants were appointed executors of his estate, and on May 31, 1899, such executors had another *scire facias* writ issued to revive said judgment, and said writ was returned "Not found" as to said defendants, and upon such return the court crier made proclamation in court, as required by statute. On August 1, 1899, an *alias scire facias* writ was issued to revive said judgment, placed in the hands of the sheriff for service, and was also returned "Not found." Proclamation was made in like manner, and no one at that time, or since, interposed any objection to the revival of said judgment. And on April 3, 1900, judgment was entered and liquidated against the defendants in said court of common pleas in the sum of \$3,499.53. At the time of the execution of the original note both of the makers were residents of, and domiciled in, the commonwealth of Pennsylvania. It is observable that this proceeding is not based upon the original note, nor the original judgment as entered by the prothonotary, for the principle is well defined that the note was merged into the original judgment, and that that judgment was merged into the succeeding one, and so on until the judgment last entered on April 3, 1900, and that is the basis of this action.

Some technical objections are made to the complaint, but from the view of the law which we have taken, we deem it unnecessary even to refer to such technical objections, and shall determine the rights of the parties upon their merits. It is the theory of appellants, as disclosed by their brief and in oral argument, that the complaint affirmatively shows that the original judgment and all subsequent revivals thereof, were in strict accordance with the laws of the commonwealth of Pennsylvania, and the courts of this state are bound thereby, under that provision of the federal constitution which says: "Full faith and credit shall be given

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in each state to the public acts, records, and judicial proceedings of every other state." Const. U. S., Art. 4, §1. On the contrary, counsel for appellee contend that the original judgment is not within that constitutional provision, because it is not a judgment of a court, nor of any judicial officer, but merely the act of a ministerial officer, which does not rise to the dignity of a judgment within the provision of the Constitution. It is also contended that the original note authorized an attorney to appear and confess judgment, and as this was never done, the courts of this State are not required to enforce against a citizen of this State a judgment by virtue of such warrant of attorney, and without any appearance by him or for him. It is also contended that a *scire facias* judgment rendered in the state of Pennsylvania without service of process or appearance can not be enforced in this State, notwithstanding it might, under the laws of that state, be a valid and binding judgment, and enforceable against the judgment defendant.

In the case of *Thormann v. Frame*, 176 U. S. 350, 20 Sup. Ct. 446, 44 L. Ed. 500, Chief Justice Fuller said: "It is thoroughly settled that the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of other states, does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered over the subject-matter, or the parties affected by it, or into the facts necessary to give such jurisdiction."

In the decision of this case, our inquiry need not go farther than to determine whether or not the common pleas court of Venango county, Pennsylvania, by the proceedings under the *scire facias* writ, acquired jurisdiction over the person of the defendant, so as to render a judgment binding on him in this State. It certainly did not acquire jurisdiction over him by virtue of the warrant of attorney expressed in the note, for that power or warrant was exhausted in the rendition of the original judgment. It did

not acquire jurisdiction over him by the issuing and service of any process known to the law, for by the facts exhibited it is expressly shown that this was not done. If jurisdiction was acquired, it was by virtue of the return of the sheriff of two successive *scire facias* writs, showing that the defendant was not found, and by proclamation of the court crier. To conclude that jurisdiction of the person was acquired, we must declare as a legal rule, that two returns of *nihil* to *scire facias* writs under the Pennsylvania statute are equivalent to personal service or appearance by the defendant. This we can not do. The rule is fundamental that jurisdiction of the person is obtained in two ways: (1) By service of process duly issued; and (2) by appearance in court. In this case jurisdiction was not obtained over the person of Dilks either by process duly served or by his voluntary appearance. If the original judgment or the *scire facias* judgment were valid and binding in that state, it was, by virtue of the statute cited, peculiar to that jurisdiction.

In the decision of this case it is necessary for us to determine the validity of these revival judgments within the jurisdiction of the commonwealth of Pennsylvania. The controlling question here is whether such judgment, thus rendered in that state, against a person not a resident of the state where rendered, is valid and binding on a citizen of this State and enforceable by our courts.

The case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, is illustrative of the principle under consideration. That was an action to recover possession of real estate situate in the state of Oregon. The defendants claimed to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of that state. When the action was commenced and judgment rendered, the defendant was a nonresident of Oregon. He was not personally served with process. He

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did not appear to the action, and judgment was rendered against him upon his default in not answering the complaint upon a constructive service of summons by publication. The civil code of Oregon provides for such service when an action is brought against a nonresident and absent defendant and he has property within the state. The question involved was the validity of a money judgment rendered in one state in an action upon a simple contract against a resident of another state, without personal service of process upon him or his appearance therein. In speaking of the validity of the judgment, in the state where rendered, the Supreme Court by Mr. Justice Field said, on page 732: "Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give them. Since the adoption of the fourteenth amendment to the federal Constitution the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute a due process of law. * * * To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." In that case the court announces the rule in specific terms how jurisdiction is to be obtained as follows: "As stated by Cooley in his treatise

on Constitutional Limitations, 405, for any other purpose than to subject the property of a nonresident to valid claims against him in the state 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'"

In the case of *Weaver v. Boggs*, 38 Md. 255, it was held that suit could not be maintained in the courts of Maryland upon a judgment of a court of Pennsylvania, rendered upon returns of *nihil* to two successive writs of *scire facias* issued to revive a Pennsylvania judgment, where the defendant at the time of the issuing of the writs was a resident of Maryland, and out of the jurisdiction of the court that rendered the judgment.

In the case of *Grover, etc., Mach. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670, the Supreme Court quoted approvingly from the Maryland case the following: "It is well settled that a judgment obtained in a court of one state can not be enforced in the courts and against a citizen of another, unless the court rendering the judgment has acquired jurisdiction over the defendant by actual service of process upon him, or by his voluntary appearance to the suit and submission to that jurisdiction. Such a judgment may be perfectly valid in the jurisdiction where rendered and enforced there even against the property, effects and credits of a nonresident defendant there situated; but it can not be enforced or made the foundation of an action in another state." The court said, in referring to the case of *Weaver v. Boggs, supra*, where the judgment, as here, was entered by a prothonotary: "Upon its face, then, the judgment was invalid, and to be treated as such when offered in evidence in the Maryland court. * * * The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or of duty, thereby permitting the law of another state to override their own."

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In *Du Pont v. Abel*, 81 Fed. 534, it was said: "A personal judgment is without validity if rendered in a state court in an action upon a money demand against a non-resident upon whom no personal service within the state was made, and who did not appear. Such a judgment may be perfectly valid in the jurisdiction in which it was rendered, and enforced even against the property, effects, and credits of the nonresident there situated, but it can not be enforced or made the foundation of an action in another state."

In the case of *Brooks v. Dun*, 51 Fed. 138, there is an exhaustive review of the authorities, and it was there held that the authority given by a bond given to an attorney of a court of record to confess judgment did not authorize the prothonotary of the court to do so.

Since the decision of the case of *Pennoyer v. Neff*, *supra*, the question there decided has been before the circuit courts of the United States in various forms, and their decisions have been uniformly adverse to the validity of service in such cases as this without personal service of the defendant in the state where the suit is brought, or his voluntary appearance therein. See *Brooks v. Dun*, *supra*, and authorities there cited.

The case most directly in point, and one which covers every debatable question here involved, is *Owens v. Henry*, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837. The facts upon which the case was decided were, in substance, these: A judgment was duly recovered in a Pennsylvania court against Henry, while he was a citizen of that state. Subsequently *scire facias* was issued to revive the judgment, and judgment was rendered for want of appearance on two returns of *nihil* to two successive *scire facias* writs. This was in accordance with the provisions of the Pennsylvania statute above cited. Upon such *scire facias* judgment suit was brought against Henry in the United States circuit court for the district of Louisiana, to which state

he had removed, and where he resided until his death. Chief Justice Fuller, in delivering the opinion of the court, said: "Viewed as a new judgment rendered as in an action of debt, it has no binding force in Louisiana, as Henry had not been served with process or voluntarily appeared. And considered as in continuation of the prior action and a revival of the original judgment for purposes of execution, on two returns of *nihil*, it operated merely to keep in force the local lien, and could not be availed of as removing the statutory bar of the *lex fori* for the same reason."

Betts v. Johnson, 68 Vt. 549, 35 Atl. 489, was also an action on a *scire facias* judgment rendered in Pennsylvania. It was there held that while full credit is to be given in the courts of Vermont to the judgments of a sister state, whether the court rendering such judgment had jurisdiction is always open to inquiry, and that a personal judgment upon a money demand entered without personal service within the state or a voluntary appearance is invalid. It was also held that a power contained in a note to appear and confess judgment was exhausted by the confession of judgment, and does not extend to subsequent proceedings on such judgment. In the same case it was held that when a judgment was entered in Pennsylvania against a defendant upon a note containing such warrant, and subsequently, without any notice, a second judgment was entered in *scire facias* proceedings for want of an appearance, the second judgment being *quod recuperet* such second judgment was not valid in Vermont. The court there said: "In whatever view we look at the proceedings in Pennsylvania, the plaintiff is entitled to no relief; for if he stands upon the judgment entered in January, 1895, that is invalid as rendered without notice and without appearance."

The supreme court of Pennsylvania, under whose statutes appellants rely to uphold the judgment sued on, repudiates the doctrine, so earnestly contended for here, that

one state must, under the federal Constitution, enforce a judgment rendered in another state, where by the laws of such state, such judgment is enforceable there. In *Steel v. Smith*, 7 Watts & Serg. 447, quoting from the syllabus, that court declared the rule to be that: "The act of congress made to carry out the fourth article and first section of the federal Constitution, which declares that judicial records proved in the manner prescribed shall have such faith and credit given to them in any court within the United States as they have by law and usage in the courts of the state from whence they are or shall be taken, does not preclude inquiry into the jurisdiction of the court or the right of the state to confer it. Held, therefore, that a judgment in foreign attachment affecting to bind not only the property attached, but the persons of defendants, not citizens or within its precincts at the time, is to be treated as a nullity by a court in another state, though it would bind the persons of the defendants in the courts and by the laws of the state in which it was rendered."

It is but fair to say, that in some of the states a contrary rule prevails, but the great weight of authority and the sounder principle are in harmony with the conclusion we have reached.

Judgment affirmed.

THE JOHN C. GROUB COMPANY v. SMITH.

[No. 4,790. Filed November 24, 1903.]

HUSBAND AND WIFE.—*Married Women.*—*Bills and Notes.*—*Indorsement for Benefit of Husband.*—*Suretyship.*—An action can not be maintained against a married woman as an indorser of a promissory note, where the consideration for the indorsement was for the discharge of a debt of her husband, and the consideration therefor did not in any way move to her or to the benefit of her estate.

From Lawrence Circuit Court; *W. H. Martin*, Judge.

John C. Groub Co. v. Smith.

Action by the John C. Groub Company against Zipporah Smith. From a judgment in favor of defendant, plaintiff appeals. *Affirmed.*

T. J. Brooks and W. F. Brooks, for appellant.

E. K. Dye and W. R. Martin, for appellee.

COMSTOCK, J.—Appellant brought this action against appellee upon her indorsement to appellant of a promissory note in her favor not payable in bank. The complaint was in two paragraphs: The first alleged that on the 7th of July, 1900, one Eli Kinser, by his promissory note, promised to pay defendant \$353.28; that before maturity the defendant, for value received, by indorsement in writing, assigned said note to plaintiff; that on the 3d day of May, 1901, plaintiff brought his suit on said note against said Kinser in the circuit court of Lawrence county, being the county wherein said maker then resided; that on the 24th day of September, 1901, said action was tried and determined by said court, and judgment rendered against this plaintiff for costs, and that he take nothing by said suit; that said note had been executed without any consideration, of which fact the plaintiff had no knowledge until said action was tried and determined adversely to it in said court; that defendant was a party to said action, and had due notice thereof and of the defense made in said action; that there is due and unpaid the plaintiff on said note and on said indorsement the sum of \$200, etc. The second paragraph omits the allegation contained in the first “that said note was executed without any consideration, of which plaintiff had no knowledge until said action was tried and determined,” and contains the following averment not in the first paragraph: “That said note was fully paid before indorsement to this plaintiff, of which fact plaintiff had no knowledge.” Said paragraphs are in other averments identical. Appellee answered in six paragraphs, each addressed separately to each paragraph of the complaint, the

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first being a general denial; the second that the indorsement was without any consideration whatever; third, payment prior to the bringing of this action; fourth, that at the alleged date of said indorsement, plaintiff was, and still is, a married woman, the wife of Elza Smith; that the note was indorsed by her, and delivered to said plaintiff in payment of a debt of her husband to Smith; that no part of the consideration of said indorsement moved to her, nor did she derive in any way the benefit of any part of the consideration thereof; that said indorsement was solely for the debt of her husband, of which plaintiff had notice at the time of said indorsement. The fifth paragraph, in addition to the averments of the fourth, alleges that said note was not payable in bank; that the same had been fully paid except \$85; that after the indorsement of the same a suit was brought on said note by plaintiff herein against the maker, Eli Kinser, and that in answer to said complaint the maker pleaded a set-off of \$85, which set-off was sustained on the trial of said cause; that the existence of said set-off was known to plaintiff at the time of said indorsement, and that the same was accepted by plaintiff with full knowledge of the fact that the maker of the note claimed said set-off. The sixth paragraph alleges payment to plaintiff before the bringing of the suit, excepting \$85. Appellant replied in two paragraphs, the second being a general denial. To the first appellee successfully demurred. A trial resulted in a finding and judgment in favor of appellee for costs.

The assignment of errors challenges the action of the court in overruling appellant's demurrer to the fourth and fifth paragraphs of answer and sustaining the demurrer to the first paragraph of appellant's reply.

Said first paragraph of reply is as follows: "That one Eli Kinser on the 7th day of July, 1900, was the owner of certain real estate of the net value above encumbrances of \$2,786.72; that one Elza Smith, mentioned in said para-

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graph of answer, the husband of defendant, was the owner of a stock of goods of the value of \$3,140; that on said day said Elza and said Eli exchanged said property, whereby there was a difference due said Elza Smith of \$353.28, for which the said Kinser executed the note mentioned in plaintiff's complaint; that the said Elza, at the request of the defendant herein, caused the conveyance of said real estate to be made to the defendant, and caused said Kinser to execute to this defendant the note sued on. All of which was accordingly done. Said Elza Smith was indebted to plaintiff on account of goods sold him in the sum of \$353.28, whereupon, and after said date, but before the maturity of said note, the defendant, in payment of said indebtedness, and in consideration that plaintiff would discharge the said indebtedness and release the said Elza Smith, indorsed the said note to plaintiff. But plaintiff says that said note has been fully paid to defendant before said indorsement, of which plaintiff had no knowledge until the trial of the cause described in the complaint herein."

Section 6964 Burns 1901, §5119 R. S. 1881, reads: "A married woman shall not enter into any contract of suretyship, whether as indorser, grantor, or in any other manner; and such contract, as to her, shall be void." The statute recognizes the fact that one may assume the relation of surety to a contract in the form of guaranty and indorsement and in other ways. It declares the contract of suretyship of a married woman executed in any manner as invalid. An indorser of a promissory note warrants that it is a genuine and valid note, and that the maker is able to pay it. *Baldwin v. Threlkeld*, 8 Ind. App. 312; *Clark v. Trueblood*, 16 Ind. App. 98; *Nichol v. Hays*, 20 Ind. App. 369. By the contract of suretyship the surety engages to be answerable for the debt of another. Whether a married woman is principal or surety will be determined not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry, was

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the wife to receive in person or in benefit to her estate, or did she receive the consideration upon which the contract rests? *Vogel v. Leichner*, 102 Ind. 355, 360; *Field v. Noblett*, 154 Ind. 357; *Nixon v. Whitely*, 120 Ind. 360; *Voreis v. Nusbaum*, 131 Ind. 267, 16 L. R. A. 45; *Cook v. Buhrlage*, 159 Ind. 162. The facts set out in said fourth paragraph show that the indorsement was solely for the benefit of the husband of appellee; that the consideration in no way moved to her or for her benefit. Under the definition given by the decisions cited she was the surety of her husband. The Supreme Court in *Nixon v. Whitely*, *supra*, say: "It is not to be overlooked that this section [§6964 Burns 1901, §5119 R. S. 1881] expressly prohibits a married woman from becoming either a guarantor or indorser," thus interpreting the statute as meaning that a contract of indorsement is one of surety.

The consideration for the indorsement is averred in the reply to be the discharge of a debt of her husband, Elza Smith. The consideration did not in any way move to her or to the benefit of her estate.

We find no error. Judgment affirmed.

 COURT OF HONOR v. BANKERT.

[No. 4,836. Filed November 24, 1903.]

APPEAL AND ERROR.—Term-time Appeal.—Abandonment of.—Where the transcript is not filed in the office of the Clerk of the Supreme Court within sixty days after the filing of the appeal bond, the appeal as of term will be deemed abandoned and the appeal held to be taken as of the time the transcript was filed. *p. 690.*

SAME.—Dismissal.—Where a vacation appeal is on the docket for more than ninety days without appearance by appellee, or any steps taken to bring the appellee into court, it is the duty of the Clerk of the Supreme Court, under court rule thirty-six, to enter an order of dismissal. *pp. 690, 691.*

From Shelby Circuit Court; *Douglas Morris*, Judge.

Court of Honor v. Bankert.

Action by Alice B. Bankert against the Court of Honor. From a judgment for plaintiff, defendant appeals. *Appeal dismissed.*

C. H. Tindall, J. A. Tindall and W. B. Risse, for appellant.

K. M. Hord and E. K. Adams, for appellee.

WILEY, P. J.—Appellee has appeared especially in this cause, and moved to dismiss under rule thirty-six of this court. The record shows that the judgment was rendered November 7, 1902. November 15, 1902, appellant's motion for a new trial was overruled, and ninety days given to file bill of exceptions embodying the evidence. An appeal was prayed to this court, and thirty days given to file bond. The penalty of the bond was fixed by the court, and the surety suggested approved. On December 12, 1902, the appeal bond was filed, and on February 11, 1903, the bill of exceptions embodying the evidence was filed. The transcript of the proceedings below was filed in the clerk's office on May 23, 1903. Section 650 Burns 1901, provides: "The transcript shall be filed in the office of the clerk of the Supreme Court within sixty days after filing the bond." The transcript not having been filed within sixty days after the filing of the bond, the appeal, as of term, under rule one of this court shall be deemed to be abandoned, and the appeal must be held to be taken as of the time the transcript is filed. §650 Burns 1901; Ewbank's Manual, §§91, 102; Elliott App. Proc., §§246, 247. Under these authorities, the appeal in this case must be held to be a vacation appeal. The case having been appealed in vacation, and having been on the docket more than ninety days, and there being no appearance by the appellee, except for the purposes of this motion, and no steps having been taken to bring her into court, it is the duty of the clerk, under rule thirty-six to enter an order of dismissal. A defective attempt to take a term-time appeal

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must be followed by notice, or it will be dismissed under this rule. *Michigan Mutual Life Ins. Co. v. Frankel*, 151 Ind. 534; Ewbank's Manual, §91.

The motion to dismiss is sustained.

No. 5 FIDELITY BUILDING & SAVINGS UNION
v. DRIVER ET AL.

[No. 4,418. Filed November 24, 1903.]

FRAUD.—*Building and Loan Associations.—False Representations by Officers as to Maturity of Stock.—Evidence.*—In an action to foreclose a mortgage defendant filed an answer alleging that at the time of the execution of the mortgage, and the assumption thereof by him when he purchased the property, plaintiff's officers falsely and fraudulently represented that the association was in a flourishing condition and paying large dividends, and that the stock would mature within a specified number of payments, when in truth and in fact it was not in a flourishing condition, and had never had great earning capacity, and was not earning any dividends, but was organized and operated to pay large salaries, and paid all its earnings in salaries to its officers. The evidence showed that the stock in question earned dividends amounting to \$63.60, and some of the officers received no salaries; that the salaries of others were not great, and the condition of the association was not shown at the time the alleged false representations were made. *Held*, that the evidence was not sufficient to support the answer charging fraudulent representations.

From Superior Court of Madison County; *H. C. Ryan*, Judge.

Action by No. 5 Fidelity Building & Savings Union against James Driver and others. From a judgment in favor of Samuel T. Bronnenberg, one of the defendants, plaintiff appeals. *Reversed*.

D. L. Bishopp, J. R. Thornburgh, R. W. McBride and C. S. Denny, for appellant.

C. K. Bagot, Thomas Bagot and S. T. Bronnenberg, for appellees.

BLACK, J.—The appellant, a building and loan association incorporated in this State, in process of liquidation

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under the statute, sued upon a note and to foreclose a real estate mortgage, both executed by the appellees, James and Luella Driver, who had conveyed the real estate to the other appellee Samuel T. Bronnenberg, who, as a part of the consideration, agreed to pay the appellant the amount due on the note and mortgage. Upon trial the court found in favor of the appellant against the appellees Driver and Driver in the sum of \$201.40, and found in favor of the appellee Bronnenberg, and that the certificate of stock on which the loan was made by the appellant to the Drivers should remain in force as to them, but should be canceled as to the appellee Bronnenberg; and judgment was rendered accordingly. No question is made here concerning the result reached as to the Drivers, but the judgment in favor of Bronnenberg is attacked.

It is contended on behalf of the appellant that the court erred in overruling its demurrer to the amended fifth paragraph of answer, in which it was alleged that the appellant, by its agents and servants, procured and induced the appellees Drivers to make and execute the note and mortgage sued on, and to subscribe for the stock mentioned in the complaint, by fraud and collusion in this: That the defendants Drivers being then and there entirely ignorant of the business and affairs of the appellant, the appellant and its servants and agents, knowing this fact, at and prior to the execution of the mortgage and bond and the subscription for the stock, falsely and fraudulently represented to the Drivers that the appellant was making earnings and paying great dividends; that they were well and thoroughly acquainted with the conditions of its business and affairs; that it would continue to pay large dividends, so that in less than seventy-two monthly payments on the stock it would mature and satisfy the loan; that the appellees, being entirely ignorant of these facts, believed and relied on said representations, and, so believing and relying, and not otherwise, subscribed for

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the stock and borrowed the money and executed the bond and mortgage, as alleged in the complaint; that soon afterward, the Drivers being desirous to sell the mortgaged real estate to the appellee Bronnenberg, and the appellant being desirous to have Bronnenberg purchase it, for the reason that the Drivers were unable to make the payments on the stock, the appellant, by its agents and servants, then and there falsely and fraudulently stated and represented to Bronnenberg that the appellant was in a flourishing condition, that it was paying large dividends, and that its earning capacity was very great, and that it was paying such dividends that the stock in question would be matured within less than seventy-two monthly payments, and the bond and mortgage would be thereby canceled and paid; that Bronnenberg was entirely ignorant of the affairs of the corporation and its earning capacity and as to whether or not it was earning dividends, and believed and relied on said statements and representations, and believed them to be true, and so relying, and not otherwise, he purchased the property and assumed the payment of the bond and mortgage as part of the consideration, and took an assignment of the stock from the Drivers; that in truth and in fact the appellant was not in a flourishing condition, and never had a great earning capacity, and was not making or earning large dividends, or any dividends at all; that the agents and servants who made said representations were a number of persons named; that in truth and in fact the appellant was organized, doing business and operating for the purpose and object of paying its officers large salaries and consuming and exhausting all its earnings in salaries to its officers; that at the time of said representations, and at all times prior thereto, and ever since, the appellant had been and was paying all its earnings in large salaries to its officers—all of which facts were known to the appellant and its said agents and servants at the time said representations were made, and they

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were knowingly and falsely and fraudulently made for the purpose of cheating and defrauding the appellees as aforesaid; that the appellees did pay to the appellant at maturity more than seventy-two payments on the stock as aforesaid. Wherefore, etc.

It is suggested that the representations alleged in this answer were not such that a charge of fraud could be based thereon. The representations did not relate alone to future events, and were not merely expressions of opinion concerning existing conditions or values. The then existing condition of the corporation was falsely represented to be flourishing, and its business was stated to be such that, if the statement had been true, a person in the situation of the appellees might not unreasonably rely upon promises or predictions based thereon by those who made the representations. In the note it was stipulated that if the maker should pay all instalments which became due thereon, and all fines and monthly payments which became due on the stock until it became fully paid in and of the value of \$100 per share, and before any of the interest or monthly payments should have been past due for three months, then, upon surrender of the stock, the note should be deemed fully paid; and the mortgage provided that the interest, premium, and instalments were to become due on a specified day of each month until the shares should mature and become of the value of \$100. Unless the appellees were apprised by these provisions of the note and mortgage of the falsity or unreasonableness of the representations, there does not appear to have been anything of which they were bound to take notice so inconsistent with the representations as to make it unreasonable for the appellees to rely and act upon the representations. We do not perceive any such irreconcilability of the representations with the provisions of the written contract.

In *Hartman v. International Bldg., etc., Assn.*, 28 Ind. App. 65, where the answer was held to be sufficient, the

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false representation (not inconsistent with the contents of the bond and mortgage, and no by-law to the contrary appearing or being referred to in the pleadings) was that, if the defendant would become a member and contract the loan and pay the dues, interest, and premiums, the bond and mortgage would be paid and canceled by a specified number of payments. It was held that this representation was not merely a statement of intention or an expression of opinion, but was a representation of a fact. The answer now before us is different in some respects. The language relating to Bronenberg, construed according to its ordinary meaning, is to the effect, not that it was represented that, as an absolute fact, the stock would be matured and the debt would be paid by a certain specified number of payments of instalments, but that the association was then in a flourishing condition and paying large dividends and having very great earning capacity, and by reason of the fact that it was paying such dividends the stock would be matured within less than a specified number of monthly payments, and thereby the bond and mortgage would be canceled and paid. The things of which it was alleged the appellee Bronenberg was ignorant were the affairs and earning capacity of the corporation, and whether or not it was paying dividends. The things alleged to be true were that the association was not in a flourishing condition, and it never had great earning capacity, and it was not making or earning large dividends or any dividends, but it was organized and operated to pay large salaries, and always paid all its earnings in large salaries to its officers.

Material facts stated were, it was alleged, falsely and fraudulently represented as then existing, and it was upon their existence that the speedy maturity of the stock was predicted, as an expectation that might reasonably be entertained from such facts represented as then existing, and not as an absolute fact that at all events would take place.

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In considering the action of the court in overruling the appellant's motion for a new trial we have been required to look into the evidence. We find it to the effect that some of the officers did not receive salaries, and that the salaries paid, so far as has been shown by the evidence, which, on the subject of salaries, related only to a comparatively recent date, were not great; that at some time or times the stock in question earned dividends amounting to \$63.60; but as to the time or times when the dividends were earned or credited there was no evidence. The appellee Bronnenberg testified that he talked with agents of the appellant before he purchased the real estate, and that they said, the way it was paying at the time, there would not be over sixty-four payments, and guaranteed there would never be over seventy-two; also, that he relied on what they said to him in 1892 about its being paid out in seventy-two months. Being asked concerning a certain agent with whom he said he had talked, if the agent said probably it would take seventy-two months, the witness answered: "No, probably sixty-four months, and not to exceed seventy-three months. Q. That was his speculation? A. He said that was guaranteed." He testified that he bought the property and assumed the mortgage relying on these statements made by the agents and literature they showed him. No "literature" on this subject was introduced. The defense was not based on a guaranty, or a positive unqualified assertion that the stock would mature within a definite period; and we have been unable to find in the record any evidence showing the condition of the business of the appellant at the time when the representations relating to its condition were made. It was not proved that it was not then in such a flourishing condition, for the time being, that if its existing condition should continue the stock might mature as predicted. The material facts alleged to have been misrepresented were not shown in evidence as alleged in the answer. The appellee Bronen-

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berg should have taken the trouble to go into this material part of his defense.

The judgment in favor of the appellee Bronenberg is reversed, and the cause is remanded for a new trial as to him.

JAMES ET AL v. NUGENT.

[No. 4,391. Filed April 23, 1903.]

From Orange Circuit Court; W. C. Utz, Special Judge.

Application by Frederick R. Nugent for liquor license. From a judgment reversing order of board of commissioners granting the license, remonstrators appeal. *Reversed.*

C. J. Orbison, E. F. Ritter, Newton Crooke and J. L. Meginity, for appellants.

W. W. Woollen and Erans Woollen, for appellees.

COMSTOCK, J.—On March 4, 1901, the appellee Frederick R. Nugent made application to the board of commissioners of Lawrence county for a license to sell intoxicating liquors in less quantities than five gallons at a time, in the town of Mitchell, Marion township, Indiana. Due notice of his intention to apply was given by said applicant twenty days prior to said above date by publication in the Mitchell Tribune, a weekly newspaper, published in said town. On March 1, 1901, three days prior to the meeting of said board of commissioners, at which the said application was to be heard, the appellants filed with the auditor of said county, their remonstrance in writing, protesting against the granting of a license to said applicant, said remonstrance containing a majority of the legal voters of said Marion township. Together with the said remonstrances was filed the following: "To the Honorable Board of County Commissioners of Lawrence county, Indiana: Greeting—I herewith submit the within remonstrance, each name to which is signed by me by virtue of an empowerment granted me by the persons whose names are here signed, all of which is respectfully submitted. Witness my hand this 1st day of March, 1901. H. E. Woolheater," together with a copy of the power of attorney, referred to therein. The commissioners refused appellee his license. He appealed to the circuit court of Lawrence county and upon change of venue the case was tried in the Orange Circuit Court. Appellee demurred to the remonstrance on the ground that it did not state facts sufficient to constitute a good remonstrance under the act of March 11, 1895, and the trial court sustained the demur-

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rer. The court then heard the appellee upon his application and found that he was entitled to a license and rendered judgment accordingly.

The errors assigned are (1) that the court erred in sustaining the demurrer to appellants' remonstrance and thus excluding the said remonstrance as evidence and from consideration for any purpose whatever in the case or on the trial; (2) the court erred in overruling appellants' motion for a new trial.

The remonstrance shows that all the names were signed by one H. E. Woolheater, acting as the agent of the persons whose names were attached to the remonstrance under a contract of agency. The ruling upon the demurrer is the controlling question involved in this appeal. Appellee has filed no brief. At his request the cause was set for oral argument April 22, 1903. At the date named his counsel stated in open court that he did not desire to make an oral argument in the cause for the reason that the Supreme and this Court had ruled on the validity of the power of attorney remonstrance involved in the case at bar. Under *Ludwig v. Cory*, 158 Ind. 582 and *White v. Furgeson*, 29 Ind. App. 144, the trial court erred in sustaining the demurrer to the remonstrance.

The failure to file a brief or to make oral argument may fairly be held to be a confession of error. *Neu v. Town of Bourbon*, 157 Ind. 476; *Berkshire v. Caley*, 157 Ind. 1.

Upon the authority of the above decisions the judgment is reversed, with instruction to overrule appellee's demurrer to the remonstrance.

BAERTZ v. SCHMIDT ET AL.

[No. 4,270. Filed June 2, 1903.]

From Laporte Superior Court; *H. B. Tuthill*, Judge.

Action by Charles Baertz against Gustave Schmidt and another. From a judgment for defendants, plaintiff appeals. *Affirmed*.

W. W. Pepple, for appellant.

M. T. Krueger, *C. R. Collins* and *J. B. Collins*, for appellees.

HENLEY, J.—The record in this case presents but one question—the overruling of appellant's motion for a new trial. The motion for a new trial assigns but two causes: (1) That the verdict of the jury is not sustained by sufficient evidence; (2) that the verdict of the jury is contrary to law.

We have carefully examined and considered the evidence, and we find upon every material point the evidence is conflicting. Under such circumstances this court will not disturb the judgment of the trial court.

Judgment affirmed.

Union National Bank v. Franklin School Tp.

UNION NATIONAL BANK OF MUNCIE v. FRANKLIN
SCHOOL TOWNSHIP ET AL.

[No. 4,789. Filed October 14, 1903.]

From Hendricks Circuit Court; *S. A. Hays*, Special Judge.

Action by Union National Bank of Muncie, Indiana, against Franklin School Township and others. From a judgment for defendants, plaintiff appeals. *Affirmed*.

E. G. Hogate and J. L. Clark, for appellant.*G. W. Brill and G. C. Harvey*, for appellees.

WILEY, J.—This cause was transferred from the Supreme Court.

Appellant was plaintiff below, and brought its action, as assignee, upon a township note, or warrant, given as an evidence of indebtedness for heaters and ventilators purchased for the use of one of the schools of appellee township. The complaint, which is in one paragraph, seeks a recovery solely upon the *quantum meruit*. The cause was put at issue before the regular judge, and thereupon a change of venue being taken from him a special judge was appointed and called to try it. At the request of one of the parties the court made a special finding of facts and stated its conclusions of law thereon. The conclusions of law were adverse to appellant, and the assignment of errors questions their correctness.

As the questions involved in this appeal are substantially the same as those decided by this court in the case of *Lincoln School Tp. v. American, etc., Co.*, ante, 405, we do not deem it necessary to set out the special findings. It is sufficient to say that it is found as a fact that the trustee, in the purchase of heaters, etc., did not comply with the provisions of the act of February 27, 1899, and hence could not bind the township. It is also found that the price agreed to be paid for the articles furnished was reasonable, and that they were suitable and necessary for the uses intended.

In the case cited we held: (1) That a contract of this character, not made in conformity with the provisions of the "reform law" of 1899, could not be enforced; (2) that where goods are sold to a township under a contract not in conformity to the "reform law," although necessary and suitable to the purposes intended, and retained and used by the township, recovery could not be had upon the *quantum meruit*, and (3) that the act of March 4, 1899, did not repeal the act of February 27, 1899. We still adhere to the rulings in that case and the cases cited in support of it, and upon their authority the judgment is affirmed.

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ACCORD AND SATISFACTION—

Payment by Will.—Plaintiff filed a claim against decedent's estate for \$15,620 for services rendered during the life of decedent covering a period of eighteen years. There was evidence of an agreement to the effect that if claimant should remain in such employment until such time as she should marry, and faithfully perform her duties, she should receive by will or otherwise one-half of the estate, and if she should remain until the death of decedent, she should receive all of the decedent's estate. Decedent made a will giving her entire estate to others, except her household goods and \$500, which she gave to claimant, without reference to the agreement. *Held*, that the legacy was intended as a satisfaction of the debt, and the acceptance thereof by claimant amounted to a satisfaction of the debt.

Alerding v. Allison, 397.

ACTION—Joinder of causes, see **PHYSICIANS**, 2; *Thomas v. Dabblmont*, 146.

For damages for personal injuries sustained in another state, see **RAILROADS**, 6; *Baltimore, etc., R. Co. v. Ryan*, 597.

AGREEMENTS—As to railroad crossings, see **RAILROADS**, 2, 3; *Baltimore, etc., R. Co. v. Wabash R. Co.*, 201.

ALTERATION OF INSTRUMENTS—Inserting words in mortgage after its execution, see **MORTGAGES**, 3-5; *Cabell v. McKinney*, 548.

AMENDMENT—Of complaint without leave, see **APPEAL AND ERROR**, 35; *Chappell v. Jasper County Oil & Gas Co.*, 170.

Of complaint during trial, see **APPEAL AND ERROR**, 34; *Union Traction Co. v. Barnett*, 467.

Of complaint to conform to proof, see **APPEAL AND ERROR**, 33; *Whittern v. Krick*, 567.

"Amended second paragraph of complaint" supersedes original complaint in one paragraph, see **PLEADING**, 3; *Worl v. Republic Iron & Steel Co.*, 16.

ANNEXATION—Of territory to town, see **MUNICIPAL CORPORATIONS**, 5-10; *McCoy v. Board, etc.*, 331.

ANSWER—Questioned for first time on appeal, see **APPEAL AND ERROR**, 12; *Stoy v. Bledsoe*, 643.

APPEAL AND ERROR—

1. *Jurisdiction.*—*Dismissal.*—The Appellate Court takes notice of its jurisdiction, and will dismiss an appeal, where it has no jurisdiction thereof, without a motion to dismiss.

Everett Piano Co. v. Bash, 498.

APPEAL AND ERROR—Continued.

2. *Jurisdiction.—Amendatory Act.*—The act of 1903 (Acts 1903, p. 280) amending §6 and §7 of the act of 1901 (Acts 1901, p. 565) concerning appeals applies only to appeals taken after the taking effect of the amendatory act. *Everett Piano Co. v. Bash, 498.*
3. *Cause Within Jurisdiction of Justice of the Peace.—Complaint.—Demand.*—In a suit for damages for a breach of a written warranty in the sale of a piano, certain defects in the construction of the piano were alleged in the complaint, for which certain expenses were incurred, and it was alleged, "that the said instrument, if equal to the guaranty, would be of the value of \$250, whereas it is, in fact, worth not to exceed \$125, demanding judgment for \$200 damages. The complaint was amended by changing the amount as to the value of the piano from \$250 to \$400, but the demand was not increased, and plaintiff recovered a judgment for \$200, from which an appeal was taken. *Held*, that the amendment did not affect the jurisdiction, as the amount of damages demanded was not changed, that the cause was within the jurisdiction of a justice of the peace, and an appeal thereof to the Supreme or Appellate Court was prohibited by the act of 1901 (Acts 1901, p. 565). *Everett Piano Co. v. Bash, 498.*
4. *Term-time Appeal Not Perfected.*—An appeal prayed and granted in term, but not perfected, will be treated as a vacation appeal. *Court of Honor v. Bankert, 689; Burns v. Trustees of Hunteartown, etc., Church, 640.*
5. *Dismissal.*—Where a vacation appeal is on the docket for more than ninety days without appearance by appellee, or any steps taken to bring the appellee into court, it is the duty of the Clerk of the Supreme Court, under court rule thirty-six, to enter an order of dismissal. *Court of Honor v. Bankert, 689.*
6. *Term-time Appeals.—Perfected in Vacation.—Parties.*—Section 647a Burns 1901, concerning appeals by part of coparties, relates by its terms to term-time appeals alone, and has no application to an appeal asked and granted in term but not perfected. *Burns v. Trustees of Hunteartown, etc., Church, 640.*
7. *Denial of Term-time Appeal.—Harmless Error.*—The denial of a term-time appeal, if error, is harmless, where a vacation appeal is afterwards granted in which it affirmatively appears that a term-time appeal could not have resulted in benefit to the appellant. *Baltimore, etc., R. Co. v. Ryan, 597.*
8. *Joint Assignments of Error.—Answers.*—A joint assignment of error challenging the sufficiency of two paragraphs of answer is not available if either paragraph is good. *Stoy v. Bledsoe, 648.*
9. *Joint Exception.—Separate Assignment of Error.*—A separate assignment of error by one defendant, on a ruling to which appellant with his codefendants excepted jointly, presents no question for review. *Chappell v. Jasper County Oil & Gas Co., 170.*
10. *Joint Assignment of Error.—Separate Exception.*—Parties who jointly assign error can not invoke the judgment of the Appellate Court upon a ruling on a motion made by one of them separately, to which action of the court he alone excepted. *Burns v. Trustees of Hunteartown, etc., Church, 640.*
11. *Overruling Demurrer to Complaint.—New Trial.*—The ruling of the court on demurrer to a complaint can not be presented on appeal under an assignment thereof in a motion for a new trial. *Helberg v. Hammond Bldg., etc., Assn., 58.*

APPEAL AND ERROR—Continued.

12. *Sufficiency of Answer.*—The sufficiency of an answer can not be raised for the first time by an assignment of error in an appellate tribunal.
Stoy v. Bledsoe, 648.
13. *Assignment of Error.*—An assignment that "the court erred in rendering judgment" presents no question on appeal.
Hill v. Indianapolis, etc., R. Co., 98.
14. *Exception.—Review.*—Where an exception is not taken, the ruling of the court can not be successfully attacked on appeal.
Hill v. Indianapolis, etc., R. Co., 98.
15. *Joint Exceptions.—Review.*—An exception taken by two or more coparties jointly to a ruling is a formal notice of their purpose jointly to reserve the question and assign it as error on appeal, and unless the action of the court excepted to jointly can be reviewed as to all who join in the exception, it may not be reviewed as to any of them.
Home Electric Light, etc., Co. v. Collins, 493.
16. *Exception to Conclusions of Law.*—An exception to the conclusions of law admits the correctness of the facts found.
King v. Morristown Fuel, etc., Co., 476.
17. *Transcript.—Original Bill of Exceptions.—Evidence.*—Where appellant filed a written precipe with the clerk directing the making up of the transcript, and the transcript prepared contains the original bill of exceptions containing the evidence, and an entry to the effect that the clerk attached such original bill at the "request of appellant," the evidence is in the record.
Schlichter v. Taylor, 164.
18. *Precipe.—Transcript.—Bill of Exceptions.—Evidence.*—Where the precipe filed by the appellant directed the clerk to prepare and certify a "full, true, and complete transcript of the proceedings, papers on file, and judgment" in the cause, the action of the clerk in certifying the original bill of exceptions was unauthorized, and the same is no part of the record.
Chappell v. Jasper County Oil & Gas Co., 170.
19. *Question of Law.—Bill of Exceptions.—Review.*—Where an appeal has been taken under §642 Burns 1901, and the question reserved is upon the admission or exclusion of evidence, the bill of exceptions should show that the objection was made, with the grounds of objection, and that exception was taken at the time.
Fritzing v. State, ex rel., 350.
20. *Evidence.—Record.—Precipe.—Certificate.*—Where the precipe directed the clerk to prepare and certify "a full, true, and complete transcript of all the proceedings, docket entries, motions, instructions asked, given, and refused, bills of exceptions, and all papers and affidavits on file, together with the motion for a new trial, and evidence, and judgments, and to certify the original manuscript of the evidence," and the clerk certified that the foregoing "is a full, true, and complete transcript from the records in my office of all the pleadings, papers, entries, order-book entries, records, affidavits, bills of exceptions embodying the evidence, together with the motion for a new trial, instructions and all other motions and orders given in said cause," and further certified that, after the trial, at the request of defendant's attorney, the reporter filed in the clerk's office her original long-hand manuscript of the evidence, duly certified, which was embodied in a bill of exceptions, and, after being certified and signed by the judge, was filed, it can not be said that the original manuscript of the evidence is not embraced in the bill of exceptions, and the evidence is in the record. *Payne v. Moore, 360.*

APPEAL AND ERROR—Continued.

21. *Instructions.—Where Evidence Not in Record.*—In the absence of the evidence, a cause will not be reversed because of the alleged error of court in giving certain instructions and in refusing to give certain instructions, where the instructions given were correct as mere abstract propositions of law; since the court can not say, in the absence of the evidence, that the instructions given were not applicable to the case or that those refused were applicable. *South Chicago City R. Co. v. Zerler, 488.*
22. *Evidence.—Objects Used in Illustration Not in Record.*—The failure to make drawings of objects used as mere reference in a trial, for the purpose of illustration, a part of the record on appeal is not a sufficient reason for disregarding the entire evidence, when a vital issue in the case can be determined without an inspection of the object to which reference has been made. *Indiana Clay Co. v. Baltimore, etc., R. Co., 258.*
23. *Evidence.—Instructions.—Bill of Exceptions.*—The original manuscript of the evidence and the instructions can not be brought up by one bill of exceptions. *South Chicago City R. Co. v. Zerler, 488.*
24. *Record.—Instructions.*—Instructions can not be considered on appeal where it does not appear by proper order-book entry that they were filed. *Payne v. Moore, 360.*
25. *Motion to Strike Out Evidence.—Bill of Exceptions.—Review.*—The ruling of the trial court on a motion to strike out "all the evidence" of a certain witness will not be reviewed on appeal, where the bill of exceptions sets out only a part of the evidence given by the particular witness. *Fritzinger v. State, ex rel., 350.*
26. *Briefs.—Rules of Court.*—Alleged errors in the admission of testimony and the giving and refusing to give certain instructions will not be reviewed on appeal, where counsel for appellant in the preparation of their brief failed to comply with the fifth subdivision of rule twenty-two, requiring "a concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript." *Harrold v. Fuenfstueck, 275.*
27. *Questions as to the admissibility of evidence and of permitting an alleged incompetent witness to testify, will not be considered on appeal, where appellant's brief does not contain "an abstract of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript" as required by rule twenty-two of the Appellate Court.* *Schlichter v. Taylor, 164.*
28. *Waiver.—Specifications of error not discussed are waived.* *Payne v. Moore, 360.*
29. *Striking Out Interrogatories.—New Trial.*—Alleged error of court in striking out interrogatories must be presented on appeal by specification in motion for new trial. *Noah v. German-American Building Assn., 504.*
30. *When Record Fails to Show Paragraph on which Verdict Rests.*—Where, on appeal, it does not affirmatively appear from the record upon which of several paragraphs of complaint a verdict rests, the judgment must be reversed if any paragraph is bad. *Wabash R. Co. v. Lackey, 103.*
31. *Submission of Interrogatories to Jury.—Presumption.*—Where on appeal the record is silent as to the submission of certain interrogatories which the record shows to have been returned by the jury with answers, and to have been treated by the court and counsel as properly before the court at the time and after

APPEAL AND ERROR—Continued.

- they were returned, it will be presumed that they were properly submitted. *Life Assurance Co. v. Haughton*, 626.
32. *Record.—Pleading Withdrawn.*—When a pleading is withdrawn, all rulings thereon pass out of the record with it. *Chappell v. Jasper County Oil & Gas Co.*, 170.
33. *Pleading.—Proof.—Variance.—Complaint Considered as Amended.*—Where a certain transaction is erroneously referred to in a complaint as a "redemption," when the facts set forth in the same connection and the proof on the trial showed, not a redemption but a procurement of an assignment of a sheriff's certificate of sale, the judgment will not be reversed on appeal for variance. The language of the complaint in this respect will be considered as amended. *Whittem v. Kirk*, 577.
34. *Amendment of Complaint Pending Trial.—Review.*—An objection to the action of the court in permitting, after trial was begun, an amendment to the complaint, will not be reviewed on appeal, where there is no record entry showing that an amended complaint was filed. *Union Traction Co. v. Barnett*, 467.
35. *Filing Amended Complaint Without Leave.—No Exception.*—Where no objection was made to the filing of an amended complaint, no error can be predicated upon the court's action in permitting it to be done. *Chappell v. Jasper County Oil & Gas Co.*, 170.
36. *Evidence.*—A verdict can not be disturbed on conflicting evidence. *Harrold v. Fuenfstueck*, 275.
37. *Circumstantial and Opinion Evidence.—Weight.*—On appeal the court will not weigh the evidence, although the verdict of the jury is based wholly on circumstantial and opinion evidence, and positive evidence to the contrary was discredited by the jury. *Simpson v. Schuetz*, 151.
38. *Decree Not Sustained by Evidence.—Motion to Modify.*—Where any part of a decree is not sustained by the evidence, the remedy is by motion to modify; and where no motion was made to modify, the question can not be reviewed on appeal. *Shroyer v. Campbell*, 83.
39. *Review of Evidence.—Pleadings as Evidence.*—Pleadings will not be considered as a part of the evidence on appeal, unless as shown by the record, they were introduced as evidence at the trial. *Webb v. Hammond*, 613.
40. *Review of Evidence.*—In all cases not triable by a jury, the appellate tribunal, under §8 of the act of March 9, 1903 (Acts 1903, p. 341), will consider the weight and sufficiency of the evidence. *Webb v. Hammond*, 613.
41. *Harmless Error.—Erroneous Instruction.*—A cause will be reversed because of an erroneous instruction given, where it does not clearly and affirmatively appear from the record that the verdict is right upon the evidence. *Borkenstein v. Schrack*, 220.
42. *Harmless Error.*—Error in overruling a demurrer to an answer is harmless, where the jury found for plaintiff. *Wood v. Wack*, 252.
43. *Admission of Evidence.—Notice.—Harmless Error.*—In an action by a pedestrian against a street railway company for personal injuries sustained by reason of the failure of the defendant to restore a paved crossing to its former condition, the admission of evidence introduced by plaintiff for the purpose of showing that defendant was notified of the condition of the crossing can not be harmful, since it was the duty of the defendant company to

APPEAL AND ERROR—Continued.

- restore the street to its former condition, and it was bound to know whether it had done so. *Union Traction Co. v. Barnett*, 467.
44. *Exclusion of Evidence.—Harmless Error.*—It is harmless error to strike out proper evidence, where by answers to interrogatories the jury found as a fact that which was sought to be established by the evidence stricken out. *Union Traction Co. v. Barnett*, 467.
45. *When Cause Must be Affirmed.*—Where it appears from the record that the cause was fairly tried and correctly determined upon its merits it is the duty of the Appellate Court to affirm the judgment. *McCoy v. Board, etc.*, 331.
46. *Service of Process.—Presumption.*—In the absence of a showing to the contrary, it will be presumed on appeal that the summons was served upon the defendant named in the complaint: *Union Traction Co. v. Barnett*, 467.
47. *Death of Appellee.—Substitution of Parties.*—Where appellee died pending an appeal from a judgment setting aside a deed by which she conveyed her life estate in certain lands, the appeal can not be prosecuted against her heirs, under §648 Burns 1901, by substituting them as parties. *Utter v. Kersey*, 25.
48. The heirs of one who died pending an appeal from a judgment setting aside a deed by which the latter conveyed her life estate in certain real estate are not proper persons to be substituted as appellees, under §649 Burns 1901, since there could be no judgment against them for costs, nor could the cause, if reversed, be prosecuted by them in the trial court. *Utter v. Kersey*, 25.
49. *Briefs.—Rehearing.*—It is too late for appellee to appear for the first time and file a brief after the case has been decided. *Town of Crown Point v. Thompson*, 195.

APPELLATE COURT—Dismissal of appeal without motion, see **APPEAL AND ERROR**, 1; *Everett Piano Co. v. Bash*, 498.

ASSAULT—Liability of owner of park for assault of visitor, see **STREET RAILROADS**; *Indianapolis St. R. Co. v. Dawson*, 605.

Damages for an assault joined with action for malpractice, see **PHYSICIANS**, 2; *Thomas v. Dabblemont*, 146.

ASSAULT AND BATTERY—Punitive damages not awarded, see **DAMAGES**, 3; *Borkenstein v. Schrack*, 220.

ASSESSMENTS—Failure to pay in benefit society, see **BENEFICIAL ASSOCIATIONS**, 1, 2; *Grand Lodge A. O. U. W. v. Marshall*, 534.

ASSUMPTION OF RISK—When defects and consequent danger not obvious, see **MASTER AND SERVANT**, 5; *Brower v. Locke*, 353.

Question of fact, see **MASTER AND SERVANT**, 6; *Chicago, etc., R. Co. v. Martin*, 308.

Mere knowledge of risk, see **MASTER AND SERVANT**, 7; *Chicago, etc., R. Co. v. Martin*, 308.

ATTORNEY—Advice of attorney as defense to action for malicious prosecution, see **MALICIOUS PROSECUTION**, 5; *Lawrence v. Leathers*, 414.

ATTORNEY AND CLIENT—Privileged communications, see **WITNESSES**, 1; *George v. Hurst*, 660.

Contract between, see **CHAMPERTY AND MAINTENANCE**; *Tron v. Lewis*, 178.

BANK DEPOSIT—As gift, see **GIFTS**; *Goelz v. People's Sav. Bank*, 67.

BENEFICIAL ASSOCIATIONS—

1. *Failure to Pay Assessments.—Suspension by Operation of Law.*—Where the by-laws of a society provide that the failure of a member to pay an assessment within a stipulated time operates as a forfeiture of membership, no affirmative action on the part of the lodge to suspend the delinquent member is required.

Grand Lodge A. O. U. W. v. Marshall, 534.

2. *Failure to Pay Assessments.—Forfeiture.*—In a suit on a policy in a fraternal insurance company, the defendant pleaded a forfeiture because of the failure of assured to pay assessments in accordance with the laws of the order and notice given assured. The laws of the order provided that when the finances were in a certain condition a call should be made and that every call should contain a list of all deaths occurring since the last call was made, such notice to be issued by the grand recorder with the approval of the finance committee, and published in a newspaper printed and published in the State in the interest of the order and that such publication should constitute a sufficient notice to members. The answer alleged that notice of an assessment was published in the official organ of the order containing a list of the deaths and the names of the lodges to which they belonged, followed by a call upon the subordinate lodges, signed by the grand recorder and the members of the finance committee, and that a copy of said paper was mailed to the postoffice address of assured, and that assured failed to pay said assessment or any subsequent assessments. *Held*, that the facts pleaded constituted a bar to a recovery.

Grand Lodge A. O. U. W. v. Marshall, 534.

3. *Action on Certificate.—Complaint.*—To entitle the beneficiary to recover the amount designated by the certificate in a beneficial association, it is essential that the complaint show, by express averment, full performance of all the conditions imposed by the contract of insurance and laws of the order, or facts by which such conditions have been waived.

Grand Lodge A. O. U. W. v. Hall, 107.

4. *Action by Beneficiary.—Complaint.*—In an action on a certificate of insurance in a beneficial association, an allegation in the complaint that the deceased was at the time of his death a member of the order, and entitled to all the rights and privileges of such member, does not supply the necessary averment of performance of all conditions; since it is only the statement of a conclusion.

Grand Lodge A. O. U. W. v. Hall, 107.

5. *Performance of Conditions by Member.—Question of Law.*—Whether a deceased member of a benefit society was at the time of his death entitled to all the rights and privileges of the society is, in an action on a benefit certificate, a question of law for the court to determine from the facts that exist and are pleaded.

Grand Lodge A. O. U. W. v. Hall, 107.

6. *Rejection of Member.—Evidence.*—Plaintiffs brought suit on a policy of insurance in a beneficial association, alleging that after the issuance of the policy the association created a new class to which members could pass by paying certain increased assessments

BENEFICIAL ASSOCIATIONS—Continued.

and passing a medical examination; that some years before his death the deceased made application to be transferred to such class and at such time was "in perfect physical and mental health and condition" and was arbitrarily refused admission thereto. Physicians and others testified that at the time he made application for transfer his physical and mental conditions were good. The evidence further showed that his examination disclosed a pulse rate claimed by the examiner in chief to be excessive for a man at age of applicant and for such reason he was rejected by the medical examiner in chief, and no attempt was made to prove that the pulse rate was not excessive. *Held*, that the complaint was not sustained by the evidence.

Supreme Lodge K. of P. v. Andrews, 422.

7. *Forfeitures.*—Though forfeitures are not favored by the law, it is the duty of the courts to declare a forfeiture upon facts which will admit of no other conclusion.

Grand Lodge A. O. U. W. v. Marshall, 534.

8. *Members.—Resort to Court.*—A member of a mutual benefit society is not required to exhaust his remedies within the order before resorting to the courts, unless the by-laws of the society make it obligatory upon him to do so.

Supreme Lodge K. of P. v. Andrews, 422.

BILLS AND NOTES—Indorsement by wife for benefit of husband, see HUSBAND AND WIFE, 4; *John C. Groub Co. v. Smith, 685.*

Assignment of purchase-money note carries with it vendor's lien, see VENDOR AND PURCHASER, 11; *Mulky v. Karsell, 595.*

1. *Fraud in Procuring Signature.*—Where the signature to a note is secured by fraud going to the character of the paper, its maker having no intention of signing a note, he will, in the absence of negligence in affixing his signature or in failing to discover the fraud, be no more bound by it than he would be if the signature were a total forgery.

People's State Bank v. Ruxer, 245.

2. *Fraud in Procuring Signature.—Answer.*—In an action on a negotiable note by an innocent holder, an answer alleging that "if the signature is genuine, it was obtained by fraud, either in substituting the note for an insurance application or reading the same incorrectly or by means of a carbon transmitter," is insufficient, where there were no averments showing diligence on the part of defendant, and no excuse for want of negligence shown except that defendant was "not educated in the English language as it is printed."

People's State Bank v. Ruxer, 245.

3. *Fraud as to Consideration.*—Fraud in the procurement of the contract for, or in connection with, the consideration of a negotiable promissory note, will not bar a recovery by an innocent holder,

People's State Bank v. Ruxer, 245.

4. *Guarantor.—Indorser.—Instruction.*—In an action against one whose *prima facie* liability is that of a guarantor, an instruction to the jury that if they shall find from the evidence that defendant placed his name upon the back of the note merely as an indorser, they must find for the defendant, is erroneous; it being necessary that the jury also find, in addition to the fact that the appellee was an indorser, some valid defense releasing him from liability.

Price v. Lonn, 379.

5. *Action on Note.—Instruction Not Within the Issues.*—In an action to recover the *amount* of a promissory note from one whose *prima*

BILLS AND NOTES—Continued.

facie liability is that of a guarantor, an instruction to find for the defendant, if the evidence showed that it was agreed when the note was signed that the defendant should not be held liable, is erroneous, where no such defense was pleaded. *Price v. Lonn*, 579.

BONDS—Of foreign surety company, see **EXECUTORS AND ADMINISTRATORS**, 2; *Barricklow v. Stewart*, 446.

BOUNDARIES—Pointed out in sale of real estate, see **VENDOR AND PURCHASER**, 9; *Equitable Trust Co. v. Milligan*, 20.

BRIDGES—A city is liable in damages for failure to keep its bridges in a reasonably safe condition, see **MUNICIPAL CORPORATIONS**, 4; *City of Connersville v. Snider*, 213.

When city is chargeable with notice of defect, see **MUNICIPAL CORPORATIONS**, 3; *City of Connersville v. Snider*, 213.

Complaint against a city for injuries caused by defective foot-bridge, see **NEGLIGENCE**, 6; *City of Franklin v. Davenport*, 648.

BRIEFS—Failure to comply with court rules, see **APPEAL AND ERROR**, 26, 27; *Harrold v. Fuenfstueck*, 275; *Schlichter v. Taylor*, 164.

On rehearing, see **APPEAL AND ERROR**, 49; *Town of Crown Point v. Thompson*, 195.

BUILDING AND LOAN ASSOCIATIONS—False representations by officers as to maturity of stock, see **FRAUD**, 2; *Fidelity Building, etc., Union v. Driver*, 691.

1. *Liquidation.—Adjustment of Loans.*—Plaintiff, a borrower from a building and loan association, brought suit to have the amount of the mortgage lien ascertained and adjudged, demanding damages for breach of contract, and to quiet title upon payment of amount found due. It appeared that plaintiff subscribed for sixty-five shares of stock, thirty-five shares thereof to be "cash shares," and thirty shares "coupon shares," on which it was to have a loan of \$2,600 and pay fifty cents per share per month on the cash shares, and sixty cents on the coupon shares, for ninety-eight months in full payment of the loan, but the bond and mortgage were executed in accordance with the printed forms of the association, expressing a different contract. The association accepted payments for a period of fourteen months in accordance with the agreement, and then notified plaintiff that it had suspended business, and refused to receive further payments. *Held*, that the remedy sought by plaintiff is incompatible with the recovery of damages for the breach of the contract, and, in ascertaining the amount due on the loan, it not being properly disclosed whether the association was solvent or insolvent, the parties should be placed in the relation of debtor and creditor, and the borrower charged with legal rate of interest on the loan from the date of its execution to the time of the rendition of the finding, and credited with the amount paid as interest and premium, as treated by the association in distributing the same upon its books.

Home Savings Assn. v. Noblesville, etc., Church, 115.

2. *Limitation of Payments.—Maturity of Stock.*—A limitation placed on the number of payments a stockholder is required to make to mature his stock as provided by the certificate of stock is of no avail to a borrowing member, where such agreement as to the

BUILDING AND LOAN ASSOCIATIONS—Continued.

number of payments is not carried into the bond and mortgage securing the loan, but on the contrary provided therein that the borrower shall continue to pay the dues until the stock matures.

Noah v. German-American Building Assn., 504.

3. *Representations Made by Officers.—Estoppel.*—Oral or printed statements made by the officers or agents of a building and loan association in direct contradiction of the by-laws, or in contradiction of the contract itself, whether relied upon by the person to whom made or not, can not be made the basis of an estoppel in a suit by the building and loan association to foreclose a mortgage, where the by-laws are made part of the loan contract by reference thereto, unless such representations were fraudulently made.

Noah v. German-American Building Assn., 504.

4. *Foreclosure of Mortgage.—Answer.—Exhibits.*—No error was committed in striking out exhibits consisting of printed statements of the condition of plaintiff building and loan association filed with answers to a complaint to foreclose a mortgage, such matters being merely evidence and admissible without being made exhibits.

Noah v. German-American Building Assn., 504.

BURDEN OF PROOF—In action for false imprisonment, see **FALSE IMPRISONMENT**, 2; *Black v. Marsh*, 53.

CARRIERS—See **RAILROADS**; **STREET RAILROADS**.

Damage to stock in transportation, see **NEGLIGENCE**, 3; *Toledo, etc., R. Co. v. Beery*, 556.

1. *Street Railroads.—Injury to Passenger while Alighting from Car.*—The strict obligation of the carrier of passengers continues not merely while the passenger is being received and being carried, but also while he is leaving or alighting from the carriage or car; and an electric railway company operating its cars on tracks in a city over a street in which excavations were made by the city adjacent to the tracks is liable for injuries received by a passenger in getting off a car stopped to let off passengers opposite such excavation, where no notice or warning was given the passenger of the excavation.

Ft. Wayne Traction Co. v. Morvilius, 464.

2. *Shipment of Stock.—Delay.—Damages.—Railroads.*—Averments in a complaint against a carrier for damages for failing to deliver cattle shipped in time for a certain market, that the carrier knew and understood that the cattle were shipped for a certain market, and knew the time of the opening of the market and the manner of preparing cattle for sale thereat, and that if the cattle had been shipped with reasonable dispatch they could have been delivered in time for such market, render the complaint good, although the bill of lading expressly stipulates that the carrier did not contract to ship the cattle by any particular train or deliver them for any particular market.

Pennsylvania Co. v. Dickson, 451.

3. *Shipment of Stock.—Contract.—Connecting Lines.—Railroads.*—An instruction in the trial of an action against a railroad company for damages to cattle caused by delay in shipment, that the connecting carrier was the agent of the initial carrier in forwarding the stock, and that the initial carrier was liable for its acts, including delays, was erroneous, where the contract of shipment stated that the stock was received for transportation from place of delivery "to destination, if on the said carrier's line of railroad, otherwise to the place where said live stock is to be received by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for

CARRIERS—Continued.

itself and on behalf of connecting carriers for transportation," and the evidence showed that the initial carrier did not own or operate a line of road to the place of destination, but delivered the stock to a connecting carrier on whose line the delay occurred.
Pennsylvania Co. v. Dickson, 451.

CASES—See OVERRULED CASES.

Cases cited, see p. vii.

CAVEAT EMPTOR—Boundaries of real estate purchased, see **VENDOR AND PURCHASER**, 9; *Equitable Trust Co. v. Milligan, 20.*

CHAMPERTY AND MAINTENANCE—

Contracts.—Attorney and Client.—A firm of attorneys and six property owners entered into a written agreement that each property owner should institute a suit for damages and injunction against defendants; that one case should be pushed by all, and if it should fail, each property owner should contribute his proportion of the costs, and if it should succeed, then each case was to be pressed for trial. The contract provided that the attorneys should receive no compensation unless successful, and if successful they should receive an amount equal to one-half of the sum collected by them. *Held*, that the contract was not champertous. *Tron v. Lewis, 178.*

CHATTEL MORTGAGES—

1. *Failure of Consideration.—Foreclosure by Assignee.*—A mortgage on a span of mules was executed to secure two notes for the purchase money thereof. Before the notes became due the mules were taken from the purchaser under a prior mortgage the existence of which the purchaser had no knowledge at the time he executed his notes and mortgage. *Held*, that the consideration for the last notes and mortgage had wholly failed and that a holder thereof who took an assignment with knowledge of the facts could not recover thereon. *Stoy v. Bledsoe, 643.*
2. *Assignee Takes Notice of Terms.*—Where, by the terms of a mortgage executed to secure the payment of two notes, both notes become due and collectible upon default in the payment of one of them, an assignee who takes the assignment after such default is chargeable with knowledge that both notes were past due at the time. *Stoy v. Bledsoe, 643.*

CHURCHES—See RELIGIOUS SOCIETIES.

CITIES—See MUNICIPAL CORPORATIONS.

COLLATERAL ATTACK—Of decree terminating a trust, see **JUDGMENT**, 1, 2; *Spencer v. Spencer, 321.*

COMPROMISE AND SETTLEMENT—Letter in reference to compromise, see **EVIDENCE**, 2; *Halstead v. Coen, 302.*

CONCLUSIONS OF LAW—See TRIAL.

CONDEMNATION—See EMINENT DOMAIN.

CONSPIRACY—To assault colored people at defendant's park, see **STREET RAILROADS**; *Indianapolis Street R. Co. v. Dawson, 605.*

CONTRACTS—See SALES.

Oral contract to convey land, see **NEW TRIAL AS OF RIGHT**, 1; *Schlichter v. Taylor, 164.*

CONTRACTS—Continued.

- To convey lands, see SPECIFIC PERFORMANCE, 1, 2; *Kepler v. Wright*, 512.
- Executed in two parts at different times, see VENDOR AND PURCHASER, 2; *Maris v. Masters*, 235.
- Sufficiency of description of real estate in contract to support suit for specific performance, see VENDOR AND PURCHASER, 1; *Maris v. Masters*, 235.
- Covenant of grantee not to sell intoxicating liquors on premises not a contract in restraint of trade, see INTOXICATING LIQUORS, 5; *Sullivan v. Kohlenberg*, 215.
- Of married woman to sell real estate, see HUSBAND AND WIFE, 5, 6, 7; *Shirk v. Stafford*, 247.
- Agreement of wife to pay expenses of husband's last sickness, see HUSBAND AND WIFE, 2, 3; *Robinson v. Foust*, 384.
- Of minor, see INFANTS, 1-3; *Shroyer v. Pettinger*, 158.
- Between attorney and client, see CHAMPERTY AND MAINTENANCE; *Tron v. Lewis*, 178.
- Between members of a family to render services of care, see EXECUTORS AND ADMINISTRATORS, 4; *Ellis v. Baird*, 295.
- To compensate by providing for in will, see EXECUTORS AND ADMINISTRATORS, 9; *Alerding v. Allison*, 397.
- Time not essence of contract, see VENDOR AND PURCHASER, 3; *Maris v. Masters*, 235.
- Reformation, see REFORMATION OF INSTRUMENTS, 1-4; *Webb v. Hammond*, 613; *Wieneke v. Deputy*, 621.
1. *When Void as Against Public Policy.*—Contracts are not held void as against public policy, unless the contract itself requires the doing of something affecting the public good, or the consideration is immoral or hurtful, or is forbidden by statute.
Cullicott v. Allen, 561.
 2. *Mistake.—Fraud.*—Where a person signs an agreement from which certain stipulations previously agreed to were omitted, and there is no relationship between the parties so as to excuse lack of care, the person so signing will be bound by the contract.
Wood v. Wack, 252.
 3. *Breach.—Measure of Damages.*—Where plaintiff sues for breach of a contract by which he was employed by defendant to install an electric light plant, the measure of damages is the difference between the contract price and the amount which it would have cost him to perform the contract.
Wood v. Wack, 252.
 4. *Rescission for Failure to Comply with Provisions.—Recovery of Part of Consideration Paid.*—C entered into an agreement with three stockholders of a corporation by the terms of which he was to purchase their certain shares of stock, \$2,000 to be paid at the time the agreement was entered into, and a second payment at a fixed time in the future. The stock was not to be assigned to C until the second payment was made. The contract was signed by the three stockholders and the corporation. The cash payment was made to the three stockholders. Upon default in making

CONTRACTS—Continued.

second payment, O was notified by the three stockholders and the corporation that they had determined to rescind any rights of plaintiff under the contract because of his failure to comply with its provisions. *Held*, that there could be no recovery by O against the corporation on account of the \$2,000 payment.

Home Electric Light, etc., Co. v. Collins, 493

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE.

Pleadings in action for death by wrongful act, see **DEATH BY WRONGFUL ACT, 2**; *Baltimore, etc., R. Co. v. Ryan, 597*.

Complaint showing on its face contributory negligence, see **MUNICIPAL CORPORATIONS, 2**; *Town of Crown Point v. Thompson, 195*.

Duty of traveler to look and listen before crossing railroad tracks, see **RAILROADS, 5**; *Rich v. Evansville, etc., R. Co., 10*.

Walking along railroad, see **RAILROADS, 4**; *Hill v. Indianapolis, etc., R. Co., 98*.

CORPORATIONS—

1. *Officers.—Election.*—Provisions in the articles of association of a corporation, organized under the statute of this State regulating the organization of manufacturing and mining companies, that the affairs of the association shall always be managed by a certain named board of directors, unless they shall become incapacitated, resign or die, and that certain named persons shall hold the other offices of the company so long as they shall remain shareholders, unless they shall become incapacitated, resign or die, are in contravention of the statute providing for the annual election of officers, and are inoperative and void.

State, ex rel., v. Anderson, 34.

2. *Elections.—Right of Stockholder to Vote.*—The provision of §3425 Burns 1901, that each stockholder shall have one vote for each share owned and held by him for ten days previous to the meeting of the corporation, and of §5055 Burns 1901, that each share shall entitle the owner to one vote, are not merely directory, but are express reservations from granted powers, securing to the stockholder an important and valuable right.

State, ex rel., v. Anderson, 34.

3. *Fraud of Stockholder in Sale of His Stock.*—Where corporate stock is purchased of stockholders who individually misrepresent the condition of the corporation for their own benefit, the corporation is not liable in damages for such fraudulent misrepresentations, although the agreement as to the terms of sale be signed by the corporation. *Home Electric Light, etc., Co., v. Collins, 493.*

4. *Stockholder's Suit.—Demand.*—A suit by a stockholder of a corporation against an officer thereof, for the benefit of the corporation, may be maintained, without showing a demand upon the board of directors to bring the suit, where the complaint discloses a condition of facts which renders it reasonably certain that a suit by the corporation would be impossible and that a demand therefor would be useless. *Teris v. Hammersmith, 281.*

5. *Stockholder's Suit.*—A complaint by a stockholder against the president of the corporation for the benefit of the corporation and its stockholders for the possession of certain iron pipe, and for an accounting, alleging that the corporation was organized for the purpose of constructing a system of water-works and had pur-

CORPORATIONS—Continued.

chased a quantity of iron pipe; that the corporation had abandoned its purpose, forfeited its right, ceased entirely to hold directors' meetings and the directors had abandoned their offices; that the iron pipe had greatly advanced in price and the president was selling the same far below the market price at a profit to himself, states a cause of action. *Teris v. Hammersmith*, 281.

COUNTIES—

Physician for Poor Person.—Payment.—Appropriation by County Council.

—A complaint against a county by a physician for services rendered a poor person is insufficient, where it is not alleged that the county council had made an appropriation for the payment of such claim or class of claims. *Gish v. Board, etc.*, 485.

COURTS—

1. *Circuit Court.—Jurisdiction Over Controversy as to Trust Estate.*—A circuit court has jurisdiction in a suit to determine the effect of a will and declaration of trust, and the validity of an agreement between the parties in relation to the trust.

Spencer v. Spencer, 321.

2. *Collateral Attack.*—A decree rendered by a court having jurisdiction both of the subject-matter and the parties can not be assailed collaterally.

Spencer v. Spencer, 321.

COVENANTS—Of grantee not to sell liquors on premises, see **INTOXICATING LIQUORS**, 4; *Sullivan v. Kohlenberg*, 215.

1. *Warranty Deed.—Grantee's Knowledge of Encumbrances.*—The right of a grantee to recover on a covenant of warranty in a deed is not affected by the grantee's knowledge of the existence of an encumbrance at the time of conveyance. *Whittem v. Krick*, 577.

2. *Against Encumbrance.*—A covenant of warranty against encumbrances, in a deed of conveyance, runs with the land.

Whittem v. Krick, 577.

3. *Breach of Covenant.—Death of Covenantor.—Action Against Heirs.*—Where a claim against a decedent's estate is in the nature of damages for a breach of warranty in a deed which had been executed by decedent, and which did not accrue until after the final settlement of the estate, there may be a recovery in an action against the legal heirs of the decedent. *Whittem v. Krick*, 577.

DAMAGES—See **CARRIERS**; **MASTER AND SERVANT**; **NEGLIGENCE**; **RAILROADS**; **STREET RAILROADS**.

For injuries sustained by tenant because of defective premises, see **LANDLORD AND TENANT**, 1; *LaPlante v. LaZear*, 433.

For death by wrongful act, see **DEATH BY WRONGFUL ACT**, 1, 2; *Baltimore, etc., R. Co. v. Ryan*, 597.

Measure of in condemnation for pipe-line, see **EMINENT DOMAIN**, 1, 2; *Muncie Nat. Gas Co. v. Allison*, 50.

By fires escaping from right of way, see **RAILROADS**, 7-9; *Wabash R. Co. v. Lackey*, 103; *Indiana Clay Co. v. Baltimore, etc., R. Co.*, 258.

DAMAGES—Continued.

For malpractice and assault joined in same action, see **PHYSICIANS**, 2; *Thomas v. Dabblemont*, 146.

For injury to a wall, see **PARTY WALLS**, 1-3; *Payne v. Moore*, 360.

Defective bridges, see **MUNICIPAL CORPORATIONS**, 4; *City of Connersville v. Snider*, 218.

Establishment of highway, see **HIGHWAYS**, 2; *Angell v. Hornbeck*, 59.

Measure of for breach of contract to install an electric light plant, see **CONTRACTS**, 8; *Wood v. Wack*, 252.

To stock by delay in shipment, see **CARRIERS**, 2, 8; *Pennsylvania Co. v. Dickson*, 451.

1. *Landlord and Tenant.—Nominal Damages.—Evidence.*—Where in an action by a tenant for damages for wrongful eviction the defendant pleaded a complete defense to the action and introduced evidence in support thereof, but nothing in mitigation of damages, and there was evidence showing actual damages, capable of estimation with reasonable certainty, a verdict in favor of plaintiff for mere nominal damages was erroneous.

Parson v. Dean, 46.

2. *Pleading.—Evidence.*—An averment in a complaint in an action for personal injuries that "the muscles of plaintiff's legs, arms, sides, back, abdomen, and bowels were strained and bruised to an extent that plaintiff suffered great pain of body and anguish of mind" was sufficient to admit evidence that a hernia with which plaintiff was suffering at the time of the injury was aggravated by the injuries received.

City of Connersville v. Snider, 218.

3. *Assault and Battery.—Punitive Damages.*—Punitive damages can not be awarded for an assault and battery, since defendant is also subject to a criminal prosecution.

Borkenstein v. Schrack, 220.

DEATH—Of appellee pending appeal, see **APPEAL AND ERROR**, 47; *Utter v. Kersey*, 25.

DEATH BY WRONGFUL ACT—

1. *Administrator May Sue for Sum Less than Limit Fixed by Statute.*—A statute authorizing an action by a personal representative for the benefit of the next of kin to one killed by the wrongful act of another, and limiting the amount of recovery to \$5,000, does not preclude the personal representative from suing for a sum less than \$5,000.

Baltimore, etc., R. Co. v. Ryan, 597.

2. *Complaint.—Contributory Negligence.*—In an action against a railroad company for a death by wrongful act, the complaint need not aver absence of contributory negligence, nor need it state facts showing freedom from contributory fault.

Baltimore, etc., R. Co. v. Ryan, 597.

DEBT, ACTION OF—

Ultra Vires.—Estoppel.—A borrower is estopped by receiving a loan and keeping the money from setting up the defense that the creditor had no power to make the loan.

Noah v. German-American Building Assn., 504.

DECEDENTS' ESTATES—See DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; WILLS.

Payment of debt by legacy, see ACCORD AND SATISFACTION; *Alerding v. Allison*, 397.

Action against heirs for breach of covenant of warranty of ancestor, see COVENANTS, 3; *Whittern v. Krick*, 577.

DEEDS—See COVENANTS.

Disaffirmance by infant, see INFANTS, 1-5; *Shroyer v. Pittenger*, 158.

Former conveyances, see QUIETING TITLE, 5; *Blair v. Whittaker*, 664.

Covenant not to sell intoxicating liquors on premises, see INTOXICATING LIQUORS, 4; *Sullivan v. Kohlenberg*, 215.

1. *Execution and Record of Deed Without Knowledge of Grantee.—Delivery.*—Where a deed of conveyance was executed and recorded without the knowledge of the grantee, and after record the grantors took possession of the deed and exercised dominion over it, and where the purpose of the grantor was that the deed should not be delivered except upon a certain contingency which did not arise, there was no delivery. *Franklin Ins. Co. v. Feist*, 390.

2. *Delivery.*—A delivery of a deed is not effective without an intent on the part of the grantor that it is to be delivered, accompanied by an act to carry out such intent. *Franklin Ins. Co. v. Feist*, 390.

3. *Recording.—Validity.*—The recording of a deed is not essential to its validity as between the parties. *Blair v. Whittaker*, 664.

4. *Disaffirmance by Infant Feme Covert.*—Under §3364 Burns 1901, a married woman can not disaffirm a conveyance made during minority until she has restored to her grantee the full consideration received. *Blair v. Whittaker*, 664.

DEFAULT—Setting aside, see JUDGMENT, 8; *Baltimore, etc., R. Co. v. Ryan*, 597.

DELIVERY—Of deed, see DEEDS, 1, 2; *Franklin Ins. Co. v. Feist*, 390.

Of threshing machinery, see SALES, 1, 2; *Avery Mfg. Co. v. Emsweller*, 291.

DEMAND—For deed in suit for specific performance, see VENDOR AND PURCHASER, 4; *Maris v. Masters*, 235.

DEMURRER—Form of, see PLEADING, 11; *Toledo, etc., R. Co. v. Beery*, 556.

For misjoinder of causes of action, see PLEADING, 10; *Shroyer v. Pittenger*, 158.

DEPOSITIONS—As evidence, see EVIDENCE, 4; *Black v. Marsh*, 53.

Taken without notice, see EVIDENCE, 5, 6; *Black v. Marsh*, 53.

Taken by One of Two Defendants.—One of two defendants can not take depositions by service of a notice upon the sole plaintiff, and thereby bind his codefendant. *Black v. Marsh*, 53.

DESCENT AND DISTRIBUTION—See EXECUTORS AND ADMINISTRATORS; WILLS.

Right of husband in wife's property as against a mortgage executed thereon for living expenses, see HUSBAND AND WIFE, 1; *Herbert v. Rupertus*, 553.

1. *Husband and Wife*.—When all of Husband's Property Descends to Wife.—Where a man dies intestate and childless, the owner of real estate, leaving a widow, and without father or mother surviving, but brothers and sisters or their descendants, the widow takes the entire estate under §2651 Burns 1901.

Haugh v. Smelser, 571.

2. *Property of Childless Second Wife*.—Testator left surviving him a childless second wife and children by a former marriage. He gave to his wife such portion of his estate as she would take under the statutes then in force in the absence of a will. Under the statutes then in force (§2487 R. S. 1881), as construed by the Supreme Court, such wife took a fee, and the children by the former marriage, at her death, became her forced heirs. Plaintiff brought suit to recover the interest of her deceased husband in the real estate devised to his stepmother. The complaint showed that plaintiff's husband died before his stepmother. Held, that plaintiff could not recover. *Bateman v. Bennett*, 277.

DISAFFIRMANCE—Of deed, see DEEDS, 4; INFANTS, 1-5; *Blair v. Whittaker*, 664; *Shroyer v. Pittenger*, 158.

DIVORCE—

Decree Providing for Maintenance of Minor Child.—When not a Lien on Defendant's Realty.—A decree in a divorce proceeding, adjudging that the support, maintenance, and education of a minor child shall be a lien on the real estate of the father who was the defendant in the suit, the same to be paid out to the mother on petition to the court in such annual or semiannual sums as to the court might seem proper, is not a final judgment, and therefore not a lien on the defendant's real estate.

Matthews v. Wilson, 90.

DRUGGISTS—Sale of intoxicating liquors without license, see INTOXICATING LIQUORS, 2; *Parker v. State*, 650.

EJECTMENT—Damages for wrongful eviction, see DAMAGES, 1; *Parson v. Dean*, 46.

ELECTIONS—Of officers of corporation, see CORPORATIONS, 1, 2; *State, ex rel., v. Anderson*, 34.

ELEVATORS—Injury to employe in construction of elevator, see MASTER AND SERVANT, 8; *Parkhurst v. Swift*, 521.

EMINENT DOMAIN—

1. *Condemnation of Easement for Pipe-Lines for Natural Gas*.—Measure of Damages.—Instruction.—An instruction in a proceeding to condemn an easement for the purpose of laying pipe-lines for natural gas, that in estimating the damages the jury should not consider any injuries which might result to plaintiffs from any negligence or unskilfulness of defendant in the operation and maintenance of its pipe-lines over the strip of land sought to be appropriated, since the plaintiffs would have the same right

EMINENT DOMAIN—Continued.

to sue for and recover damages for such negligence or unskillfulness as would any other person injured thereby, states the law correctly.
Muncie Nat. Gas Co. v. Allison, 50.

2. *Condemnation of Easement for Pipe-Lines.—Measure of Damages.—*An instruction that the assessment of damages for property condemned for a pipe-line must relate "to the time of the condemnation" is equivalent to an instruction that the assessment of damages must relate to the time of the filing of the instrument of appropriation.
Muncie Nat. Gas Co. v. Allison, 50.

EQUITY—

Laches.—Unexplained delay in the prosecution of a right until it becomes stale constitutes such laches as forfeits the interference of the court.
Matthews v. Wilson, 90.

EVIDENCE—See DEPOSITIONS; WITNESSES.

Failure to sustain allegations of fraud, see **FRAUD**, 2; *Fidelity Building & Sav. Union v. Driver, 691.*

Court will consider weight and sufficiency in cases not triable by jury, see **APPEAL AND ERROR**, 40; *Webb v. Hammond, 613.*

Objects used in illustration not in record, see **APPEAL AND ERROR**, 22; *Indiana Clay Co. v. Baltimore, etc., R. Co., 258.*

Admissible under general denial in action to quiet title, see **QUIETING TITLE**, 3; *Wieneke v. Deputy, 621.*

Preponderance not determined by number of witnesses, see **TRIAL**, 17; *Fritzinger v. State, ex rel., 350.*

Refreshing memory, see **EXECUTORS AND ADMINISTRATORS**, 6; *Ellis v. Baird, 295.*

In record on appeal, see **APPEAL AND ERROR**, 20; *Payne v. Moore, 360.*

1. *Action on Insurance Policy.—Heirs as Witnesses.*—Heirs of insured were not incompetent witnesses, under §507 Burns 1901, as to the health of insured when he made his application, in an action on an insurance policy payable to the "legal heirs" of insured.
Supreme Lodge K. of P. v. Andrews, 422.
2. *Compromise and Settlement.—Landlord and Tenant.*—A letter written by defendant to plaintiff with a view of settling the controversy between them in regard to the removal of timber from land held by defendant under a lease, that the matter could be fixed up, and that as soon as defendant could procure an itemized list of the wood sold he would show same to plaintiff and pay over all of the money received for the wood, was improperly admitted in evidence in an action by lessor against the lessee for waste.
Halstead v. Coen, 302.
3. *Expert Testimony.—Hypothetical Question.—Harmless Error.*—The embracing in a hypothetical question of assumed facts that were without support in the evidence is harmless, where the court instructed the jury that the value of the opinion given by an expert upon a hypothetical question must depend upon the facts proved which are embraced in the question.
Thomas v. Dabblemont, 146.

EVIDENCE—Continued.

4. *Depositions.*—The evidence delivered by depositions, like other evidence, must be scrutinized, excluded and limited by the court in accordance with the rights of the parties. *Black v. Marsh, 53.*
5. *Deposition Taken Without Notice.*—The fact that a party not present at the taking of a deposition and who had no notice thereof might have introduced it in evidence against those who were parties to it does not affect his right to object to its introduction by them against him. *Black v. Marsh, 53.*
6. *Deposition Taken Without Notice.*—A deposition objected to by one not present when it was taken, and to whom no notice has been given of the intention to take it, is not competent evidence against him. *Black v. Marsh, 53.*
7. *Reference to Documents.—Cross-Examination.*—Where in the trial of an action for damages to property the plaintiff testified to the value of the different items of property by reference to an invoice thereof made by himself and wife with a view of selling a half interest therein to a third person, it was proper to cross-examine him as to the source from which he got the values, and as to his opinion of the values of the items of property without reference to the inventory. *Payne v. Moore, 360.*
8. *Hearsay.*—In an action on a promissory note, defended on the ground that plaintiff was not the owner of the note, a letter written to defendants by a third person, tending to show that he was the owner of the note, was inadmissible. *George v. Hurst, 660.*

EXAMINATION—Of adverse party can not be made basis for striking out pleading as sham, see **PLEADING, 7**; *Stars v. Hammersmith, 610.*

EXCEPTIONS, BILL OF—See **APPEAL AND ERROR.**

EXECUTION—

Institution of Action for Possession of Property.—Dismissal.—Notice.—Replevin.—An answer in a suit in replevin to recover possession of certain personal property in the hands of an officer, under execution, alleging that plaintiff brought suit for the possession of the property so seized on execution, but dismissed the same, is not bad for failure to allege that notice was served upon the execution defendant upon the seizure of the goods as required by §1613 Burns 1901, since the suit to try the right of property dispensed with the statutory notice, and her failure to prosecute the same to final judgment with reasonable diligence constitutes a bar to any action against the officer or the purchaser of such property on account of the same. *Small v. Finch, 18.*

EXECUTORS AND ADMINISTRATORS—See **DESCENT AND DISTRIBUTION; WILLS.**

Claim based upon agreement made by decedent to pay grandson's wife to support her husband during his last sickness, see **HUSBAND AND WIFE, 2, 3**; *Robinson v. Foust, 384.*

1. *Removal.—Petition.—Demurrer to Petition.—Bonds.*—A demurrer for want of facts was proper to test the sufficiency of a petition for the revocation of the appointment of an executor because of an alleged invalid bond. *Barricklow v. Stewart, 446.*

EXECUTORS AND ADMINISTRATORS—Continued.

2. *Bonds.—Foreign Surety Companies.*—A petition for the removal of an executor on the ground that the petitioner is informed and believes that his bond is invalid because it purports to have been executed by a foreign surety company, and there is no authority on file in the county showing that the company is authorized to execute bonds, nor any authority on file in the county showing the authority of the alleged resident vice-president to execute bonds in behalf of said company, is insufficient; since such companies are governed by special statutes, §§5480-5494 Burns 1901, which do not require the agents thereof to file certificates in the counties in which they desire to do business, and even if the law required the filing of such certificate the failure to comply with such provision would not render the bond invalid.
Barricklow v. Stewart, 446.
3. *Claims Against Decedents' Estates.—Care of Decedent.—Evidence.*—Where in the trial of a claim for board and care of decedent it appeared that claimant and her family lived at the home of decedent at the time of the rendition of the services, the court erred in refusing to permit defendant to prove that plaintiff said, as she was starting for the home of decedent, that she would have to go there and do the washing and cooking for the old gentleman, and take care of him, that the old gentleman was to furnish the provisions for her family.
Ellis v. Baird, 295.
4. *Claims Against Decedents' Estates.—Care of Decedent.—Contracts.—Evidence.*—Where the person rendering the services and the person for whom they are rendered are members of a family living together as one household and the services appertain to such condition, an implication of a promise on the part of the recipient to pay for the services does not arise from the mere rendition and acceptance thereof, but the service will be presumed to be gratuitous; and, to support a recovery therefor, the burden is upon the plaintiff to show an express contract for compensation, or such circumstances as manifest a reasonable expectation on his part of compensation therefor.
Ellis v. Baird, 295.
5. *Claims Against Decedents' Estates.—Evidence.—Physicians.—Cross-Examination.*—Where in the trial of a claim against a decedent's estate a physician as a witness for defendant testified that he treated decedent during his last sickness, stating the number of times medicine was given and who administered it, no error was committed in permitting plaintiff to ask him, on cross-examination, for what diseases he treated decedent.
Ellis v. Baird, 295.
6. *Claims Against Decedents' Estates.—Care of Decedent.—Evidence.—Refreshing Memory.*—In the trial of a claim against a decedent's estate, for board and care of decedent, the court erred in refusing to permit a witness to testify to the articles of provisions furnished by him to decedent by refreshing his memory by reference to plaintiff's bill.
Ellis v. Baird, 295.
7. *Claims Against Decedents' Estates.—Care of Decedent.—Evidence.*—In the trial of a claim against a decedent's estate for board and care of decedent in his last sickness, a verified claim of claimant's husband, for the same kind of services, and rendered at the same time as that embraced in plaintiff's claim, was properly excluded.
Ellis v. Baird, 295.
8. *Claims Against Decedents' Estates.—Evidence.*—No error was committed in the trial of a claim against a decedent's estate for board and care of decedent in his last sickness in refusing to admit testimony of a witness as to a statement made at the time

EXECUTORS AND ADMINISTRATORS—Continued.

of the purchase of groceries for the family, claimant and her family living at the time with decedent, claimant not being present at the time the statement was made. *Ellis v. Baird*, 295.

9. *Claims.—Payment by Will.—Estoppel.*—In the trial of a claim against a decedent's estate for services under an alleged contract to compensate claimant by will, no plea of estoppel was necessary in order to enable defendant to take advantage of the acceptance by the claimant of a legacy given her by decedent. *Alderding v. Allison*, 397.

EXEMPTIONS—

Pleading.—The right of exemption is given only upon contracts express or implied, and when such right is pleaded it must appear that the judgment was of the character entitling the claimant to the exemption. *Franklin Ins. Co. v. Feist*, 390.

EXPERT TESTIMONY—As to hypothetical question, see EVIDENCE, 3; *Thomas v. Dabblemont*, 146.

FACTORY ACT—Failure to guard machinery, see MASTER AND SERVANT, 10, 11; *Indiana Mfg. Co. v. Wells*, 460.

Assigning dangerous work to minor, see NEGLIGENCE, 7; *Brower v. Locke*, 353.

Failure to instruct as to use of machinery, see MASTER AND SERVANT, 9; *Indiana Mfg. Co. v. Wells*, 460.

Failure to provide belt shifters, see MASTER AND SERVANT, 11, 12; *Indiana Mfg. Co. v. Wells*, 460.

FALSE IMPRISONMENT—

1. *Procuring Arrest.—Question of Fact.*—In an action for false imprisonment, the question as to whether the defendant procured and directed an unlawful arrest is a question of fact.

Black v. Marsh, 53.

2. *Burden of Proof.—Presumption.*—In an action for false imprisonment, the fact that the plaintiff was imprisoned is sufficient to raise the presumption that such imprisonment was illegal, and the burden of establishing the contrary is on the defendant.

Black v. Marsh, 53.

FEDERAL COURT—Removal of cause to, see REMOVAL OF CAUSES, 1, 2; *Baltimore, etc., R. Co. v. Ryan*, 597.

FELLOW SERVANTS—Section hands, see MASTER AND SERVANT, 4; *Baltimore, etc., R. Co. v. Henderson*, 441.

FIRES—From locomotives, see RAILROADS, 7, 8, 9; *Wabash R. Co. v. Lackey*, 103; *Indiana Clay Co. v. Baltimore, etc., R. Co.*, 258.

Proof necessary in action against railroad for damages caused by fire, see NEGLIGENCE, 8; *Indiana Clay Co. v. Baltimore, etc., R. Co.*, 258.

FOREIGN JUDGMENT—See JUDGMENT.

FOREIGN STATUTE—Action based upon, see RAILROADS, 6; *Baltimore, etc., R. Co. v. Ryan*, 597.

Must be pleaded and proved, see PLEADING, 2; *Baltimore, etc., R. Co. v. Ryan*, 597.

FORFEITURE—Of membership in benefit society, see BENEFICIAL ASSOCIATIONS, 1, 2; *Grand Lodge A. O. U. W. v. Marshall*, 534.

When court will declare, see BENEFICIAL ASSOCIATIONS, 7; *Grand Lodge A. O. U. W. v. Marshall*, 534.

FRAUD—In securing signature to note, see BILLS AND NOTES, 1, 2; *People's State Bank v. Ruxer*, 245.

False representations made to wife to secure execution of mortgage, see MORTGAGES, 2; *Ristine v. Clements*, 338.

As to consideration of note, see BILLS AND NOTES, 3; *People's State Bank v. Ruxer*, 245.

In execution of contract, see CONTRACTS, 2; *Wood v. Wack*, 252.

Of stockholder in sale of his stock, see CORPORATIONS, 3; *Home Electric Light, etc., Co. v. Collins*, 493.

1. *Diligence*.—If one fails to use ordinary care and diligence to guard against fraud and imposition, he can not obtain relief from the courts. *Wood v. Wack*, 252.

2. *Building and Loan Associations*.—*False Representations by Officers as to Maturity of Stock*.—*Evidence*.—In an action to foreclose a mortgage defendant filed an answer alleging that at the time of the execution of the mortgage, and the assumption thereof by him when he purchased the property, plaintiff's officers falsely and fraudulently represented that the association was in a flourishing condition and paying large dividends, and that the stock would mature within a specified number of payments, when in truth and in fact it was not in a flourishing condition, and had never had great earning capacity, and was not earning any dividends, but was organized and operated to pay large salaries, and paid all its earnings in salaries to its officers. The evidence showed that the stock in question earned dividends amounting to \$63.60, and some of the officers received no salaries; that the salaries of others were not great, and the condition of the association was not shown at the time the alleged false representations were made. *Held*, that the evidence was not sufficient to support the answer charging fraudulent representations.

Fidelity Building & Sav. Union v. Driver, 691.

GAS—See NATURAL GAS.

GIFTS—

Delivery.—*Acceptance*.—*Evidence*.—*Bank Deposit*.—Decedent executed a will, by the terms of which she gave \$5 to her son, and all the residue of her property to her three daughters. Thereafter she deposited in a bank, for and in the name of the son, \$900, which was placed to his credit on the books of the bank, and a pass-book issued in the name of the son, which was given to decedent and kept by her until her death. About a year after the deposit was made, decedent sent to her son, by mail, a written order for him to sign, authorizing the payment of the money so deposited, on the receipt of either of them, which he returned

GIFTS—Continued.

without signing. After the death of decedent, the son's wife brought suit against him for support, and made the bank a party, asking that the money on deposit be applied toward her support, to which action he appeared and defended. *Held*, that the facts sufficiently show that decedent parted with possession of the money, a delivery thereof to a third person in trust for the son, and such an exercise of dominion over it by the son as to amount to an acceptance, to constitute a valid gift *inter vivos*.

Goelz v. People's Sav. Bank, 67.

GUARANTOR—Of note by indorsement, see **BILLS AND NOTES**, 4, 5; *Price v. Lonn*, 379.

HARMLESS ERROR—Sustaining demurrer to answer, see **PLEADING**, 12; *Payne v. Moore*, 360.

Overruling demurrer to answer, see **APPEAL AND ERROR**, 42; *Wood v. Wack*, 252.

In admission and exclusion of evidence, see **APPEAL AND ERROR**, 43, 44; *Union Traction Co. v. Barnett*, 467.

Erroneous instruction, see **APPEAL AND ERROR**, 41; *Borkenstein v. Schrack*, 220.

HIGHWAYS—

1. *Establishment.—Public Utility.*—In a proceeding to establish a public highway, existing highways, the location of markets with relation to the residences of the inhabitants, the character of the soil, the location of schoolhouses, churches, graveyards, and the condition of other highways already in use are proper subjects of inquiry in determining the utility of the proposed highway.

Angell v. Hornbeck, 59.

2. *Establishment.—Remonstrator.—Measure of Damages.—Instruction.*—An instruction in a proceeding to establish a public highway that "the benefits accruing to the landowner remonstrating, if there are any such benefits proved by the evidence, should be considered in connection with all the other evidence in the case, and, upon all the facts and circumstances in evidence, you will determine what amount, if any, the remonstrator has been damaged" was erroneous, since it was proper for the jury to consider only such evidence as was properly admitted upon the issue of benefits and damages in estimating remonstrator's damages.

Angell v. Hornbeck, 59.

HOUSEHOLDER'S EXEMPTION—See **EXEMPTIONS**.

HUSBAND AND WIFE—Disaffirmance of deed by infant *feme covert*, see **DEEDS**, 4; *Blair v. Whittaker*, 664.

When husband's property descends to wife, see **DESCENT AND DISTRIBUTION**, 1; *Haugh v. Smelser*, 571.

1. *Mortgage of Wife's Land for Living Expenses.—Husband's Debt.*—A husband and wife executed a note for money which was used in part to pay living expenses and in part to pay the expenses of the wife's last illness, she being sick at the time. They also executed a mortgage on the wife's real estate to secure the note. After the wife's death, and by agreement of all the parties concerned, the administrator of the deceased wife's estate

HUSBAND AND WIFE—Continued.

- sold the said real estate to pay the mortgage lien. *Held*, that the one-third of the fund derived from the sale which under the statute descended to the husband should be first applied to the satisfaction of the mortgage debt. *Herbert v. Rupertus*, 553.
2. *Wife not Required to Support Husband.*—A wife is under no legal obligation to support her husband, nor to pay out of her separate property the expenses of her husband's last sickness and funeral expenses. *Robinson v. Foust*, 384.
 3. *Wife's Agreement to Pay Expenses of Husband's Last Sickness.*—A husband was sick and unable to support himself. His wife, upon the promise of her husband's grandfather to make certain provision for her out of his estate, supported her husband out of her own separate means until his death. *Held*, that the agreement formed the basis of a valid claim against the grandfather's estate. *Robinson v. Foust*, 384.
 4. *Married Women.—Bills and Notes.—Indorsement for Benefit of Husband.—Suretyship.*—An action can not be maintained against a married woman as an indorser of a promissory note, where the consideration for the indorsement was for the discharge of a debt of her husband, and the consideration therefor did not in any way move to her or to the benefit of her estate. *John C. Groub Co. v. Smith*, 685.
 5. *Contract of Wife to Sell Real Estate.—Notes.—Consideration.*—The individual contract of a married woman to sell real estate, and to execute a bond for a deed, is void, and constitutes no consideration for purchase-money notes. *Shirk v. Stafford*, 247.
 6. *Void Contract of Married Woman to Sell Land.—Liability for Rent.*—One who takes possession of real estate under the void contract of a married woman to sell is liable for rent. *Shirk v. Stafford*, 247.
 7. *Void Contract of Married Woman.*—The contract of a married woman which is void as to her, and incapable of ratification by her, is also void as against the other party thereto. *Shirk v. Stafford*, 247.

INDORSER—Of note, see **BILLS AND NOTES**, 4, 5; *Price v. Lonn*, 379.

INFANTS—Assigning dangerous work to minor, see **NEGLIGENCE**, 7; *Brower v. Locke*, 353.

1. *Contracts Voidable.*—Contracts of infants are not void because of nonage, but voidable only. *Shroyer v. Pittenger*, 158.
2. *Disaffirmance of Contracts.*—The contract of an infant can not be avoided or disaffirmed because of nonage merely until the infant reaches majority. *Shroyer v. Pittenger*, 158.
3. *Deeds.—Disaffirmance.—Restoring Consideration.*—In a complaint to set aside a deed made by plaintiff while she was an infant it is not necessary to allege that the consideration was restored before disaffirming the sale, where it is alleged that plaintiff received no consideration for the sale. *Shroyer v. Pittenger*, 158.
4. *Deeds.—Disaffirmance.*—The act of disaffirming a deed made by an infant need not be by instrument of equal solemnity, nor in writing served upon the grantee, but may be accomplished by the infant, upon arriving at full age, by some act of positive and distinct dissent inconsistent with the continued validity of the deed. *Shroyer v. Pittenger*, 158.

INFANTS—Continued.

5. *Deeds.—Disaffirmance.*—Where a married woman twenty years of age residing in Dakota, in January, 1884, executed a deed to real estate in Indiana, the disaffirmance thereof by her after her return to Indiana in November, 1885, was within a reasonable time after arriving at full age. *Shroyer v. Pittenger*, 158.

INJUNCTION—Of nuisance, see NUISANCE, 1; *Tron v. Lewis*, 178.

Against vacation of street, see **MUNICIPAL CORPORATIONS**, 11, 12;
Hall v. City of Lebanon, 265.

1. *More Efficient Remedy.*—A remedy at law will not bar injunction, where the remedy by injunction is more practical and efficient.
Chappell v. Jasper County Oil & Gas Co., 170.
2. *Complaint.—Irreparable Injury.*—In an application for an injunction, it is not necessary to aver that the plaintiff will suffer irreparable injury if the relief asked is not granted; an averment that applicant will suffer great injury is sufficient.
Chappell v. Jasper County Oil & Gas Co., 170.
3. *Complaint.—Taxation.*—A complaint by a telephone company to enjoin the collection of taxes locally assessed is insufficient unless all of the taxes sought to be enjoined are invalid.
Parkinson v. Jasper County Tel. Co., 135.

INSTRUCTIONS—Refusal to give, see TRIAL, 18, 19; *Muncie Nat. Gas Co. v. Allison*, 50; *Fritzinger v. State, ex rel.*, 350.

When defective instruction not cured by others, see **MASTER AND SERVANT**, 13; *Indiana Nat. Gas, etc., Co. v. Fauble*, 370.

Review of when evidence is not in record, see **APPEAL AND ERROR**, 21; *South Chicago City R. Co. v. Zerler*, 488.

INSURANCE—See BENEFICIAL ASSOCIATIONS.

1. *Life Policy.—Proof of Death.—Complaint.*—Where a life policy insures against the death of insured "from any cause," a complaint on the policy by the beneficiaries need not aver proof of the cause of death, although the policy contains a provision that the company will pay the amount of the policy to the beneficiaries "immediately upon receipt and approval of the proofs of the death and cause of death" of the insured.
Life Assurance Co. v. Haughton, 626.
2. *Evidence.*—Where defendant in an action on an insurance policy introduced a witness who testified that he had worked at the same place with insured, and had seen him drink liquor, and had seen him drunk, there was no harmful error in permitting the witness to testify on cross-examination as to complaints he made to witness of pains in his head and chest.
Union Life Ins. Co. v. Jameson, 28.
3. *Void Policy.—Recovery of Premiums.—Insurable Interest.*—One who took out policies of insurance on the lives of persons in whom he had no insurable interest, without their knowledge or consent, and in violation of §4905 Burns 1901, can not recover from the company the premiums paid by him thereon, although the company knew all of the facts.
Work v. American Mut. Life Ins. Co., 153.
4. *Evidence.—Answer Not Responsive to Question.*—Where a physician as a witness in an action on an insurance policy had stated that by alcoholism he meant the excessive use of alcohol, or beverages

INSURANCE—Continued.

containing alcohol, an answer to the question, whether the effects produced by alcohol were easily observed under circumstances of that kind, that in excessive alcoholism they are easily observed, was properly stricken out, the same not being responsive to the question.
Union Life Ins. Co. v. Jameson, 28.

5. *Evidence.—Harmless Error.*—Where insured agreed in his application not to use intoxicating liquor to excess and not to practice any pernicious habit that obviously tends to shorten life, the refusal of the court to permit a medical expert to state whether he regarded the habitual use of intoxicating liquor to excess a pernicious habit was harmless, since defendant was not required to show both the use of liquor to excess and some pernicious habit to constitute a violation of the contract.

Union Life Ins. Co. v. Jameson, 28.

6. *Warranties.—Intoxicating Liquors.—Instructions.*—Where insured warranted that he would not use intoxicating liquors to excess nor practice any pernicious habit that obviously tended to shorten life, and payment of the policy was contested on the ground that insured drank to excess, it was error to instruct the jury that if they found from the nature of the deceased's employment, and his physical condition occasioned thereby, he became weak and exhausted; and was compelled to, and did, resort to stimulants, as he believed, for his own protection, and to enable him to continue his labors, and, in so doing, occasionally drank intoxicating liquors, even to the extent of being under the influence thereof, such indulgence could not be termed excessive, and could not be urged as a defense, unless you further find that such indulgences were excessive, or that they tended to, or did, shorten his life, since the instruction left it with insured to determine for himself what would be an excessive use of liquors.

Union Life Ins. Co. v. Jameson, 28.

7. *Instruction.—Construction of Contract.*—An instruction in an action on an insurance policy to the effect that such a contract should be liberally construed with a view to effectuate its purpose and if there was any ambiguity in an interrogatory in the application it should be construed most strongly against the company, and most favorably to the insured, in whose favor all doubts should be resolved, was erroneous, where the contract of insurance was plain and unequivocal.

Union Life Ins. Co. v. Jameson, 28.

INTERROGATORIES TO JURY—See TRIAL.

Submission to jury, see APPEAL AND ERROR, 31; *Life Assurance Co. v. Haughton, 626.*

INTOXICATING LIQUORS—Business of selling may constitute a public nuisance, see NUISANCE, 1; Tron v. Lewis, 178.

1. *Unlawful Sales.*—Where one licensed to sell liquor in a certain room provided tables in the grounds adjoining and employed young men, some of them minors, as waiters, who served the patrons at such tables, the waiters being supplied at the bar with tickets which they used in payment for liquors, and which were paid for by them at such rate that they received for their services ten cents for sales amounting to \$1.10, such sales, whether made by the waiters or by the licensee, were unlawful.

Tron v. Lewis, 178.

INTOXICATING LIQUORS—Continued.

2. *Sale by Druggist.—Of Compound Containing Whiskey.*—Where a druggist without license to sell intoxicating liquors, and without a prescription from a physician, sold a compound consisting of whiskey and gum guaiacum to be used, and which was used by the purchaser as a remedy for rheumatism, the sale was not in violation of §7276 Burns 1901, making unlawful the sale of intoxicating liquors without license. *Parker v. State, 650.*
3. *License.—Note Given in Payment.*—Where a town ordinance required the payment of the license fee in advance of the issuing of a license to sell intoxicating liquors, a note given in payment for such license is without consideration, and void. *Ristine v. Clements, 338.*
4. *Agreement Not to Permit Sale of Liquor on Premises.—Subsequent Purchaser.—Covenant.*—An agreement of record between the owner of the south half of a lot and the purchaser of the north half not to permit the sale of intoxicating liquors on the south half of the lot, nor to convey the same without inserting a restrictive clause to that effect in the deed, made in consideration of such purchase, and of an agreement to erect a joint building on the lot, though not a covenant running with the land, is enforceable in equity against a subsequent owner under a deed without the restrictive clause. *Sullivan v. Kohlenberg, 215.*
5. *Agreement Not to Permit Sale of Liquor on Premises.—Monopoly.—Restraint of Trade.*—A contract prohibiting the sale of intoxicating liquors upon a certain lot is not invalid as against public policy in restraint of trade, or as tending to create a monopoly. *Sullivan v. Kohlenberg, 215.*

JOINT TORT-FEASORS—Separate trials, see **TRIAL**, 2; *Black v. Marsh, 53.*

JUDGMENT—See EXECUTIONS.

Alternative judgment in suit for specific performance, see **VENDOR AND PURCHASER**, 6; *Maris v. Masters, 235.*

Motion to modify, see **TRIAL**, 9; *Kepler v. Wright, 512.*

1. *Decree Terminating a Trust.—Collateral Attack.*—Where a court has decreed in a suit between the parties to a trust that the trust be closed and terminated in accordance with an agreement and settlement, a subsequent suit by one of the parties seeking to have so much of the decree vacated as declares the trust terminated, is a collateral attack. *Spencer v. Spencer, 321.*
2. *Collateral Attack.*—A judgment will not be set aside upon a collateral attack unless it is made to appear that the judgment was rendered by a court without jurisdiction and is absolutely void. *Spencer v. Spencer, 321.*
3. *Setting Aside Default.—Misunderstanding of Attorney.*—A default will not be set aside on the ground that the attorney who suffered the default to be taken had misunderstood his instructions, where no reason for such misunderstanding is shown except that of forgetfulness and inattention. *Baltimore, etc., R. Co. v. Ryan, 597.*
4. *Mistake.—Setting Aside.*—No error was committed in setting aside a judgment, under §399 Burns 1901 authorizing the court in its discretion to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, where it appeared that defendant, in an action

JUDGMENT—Continued.

on a promissory note, left his home on business before the case was set for trial, and left with his family and counsel instructions where he could be reached by mail or telephone, and his counsel wrote him, but he failed to receive the letter, and his daughter telephoned him, and some person representing himself to be defendant answered saying he would be home for the trial, and judgment was taken without defendant's knowledge that the case was set for trial. *Syfers v. Keiser*, 6.

5. *Clerical Error.—Appeal.*—A judgment for damages for failure of title to a portion of real estate purchased by plaintiff will not be reversed because of an error of forty-five square feet in the calculation of the number of square feet omitted from the description in the deed, where the value of the land so omitted was found in the aggregate, and not per square foot.

Equitable Trust Co. v. Milligan, 20.

6. *Title. — Corporations. — Receivers.* — A complaint in a suit on a judgment alleging that the judgment was rendered in favor of an Ohio corporation, and that thereafter said corporation went into the hands of a receiver and the receiver was ordered by the court to turn over to a commissioner, who was ordered to sell the same, all of the property of the corporation; that the property was transferred and sold as directed, and afterward sold and transferred by the purchaser to plaintiff, shows that plaintiff was the owner of the equitable title to the judgment, and as such owner it had the right to sue on the judgment.

McCardle v. Aultman Co., 63.

7. *Equitable Ownership. — Enforcement. — Parties.* — Where the owner of the equitable title to a judgment rendered in favor of an insolvent corporation brought suit to enforce such judgment, it was necessary, in order to bind the legal title, that the said corporation, its assignees, and receivers, be made parties.

McCardle v. Aultman Co., 63.

8. *Equitable Ownership. — Enforcement. — Evidence. — Directing Verdict.* — Where, in an action on a judgment by the assignee thereof, the plaintiff introduced in evidence the original judgment and the equitable assignment thereof to plaintiff, and no evidence was introduced in defense, it was proper to direct a verdict for plaintiff.

McCardle v. Aultman Co., 63.

9. *Revival. — Merger. — Scire Facias.* — Where judgment was rendered on a note and such judgment revived by writs of *scire facias*, the note was merged in the original judgment, and that judgment was merged into the succeeding ones.

Dunn v. Dilks, 673.

10. *Foreign Judgments. — Enforcement. — Scire Facias.* — A suit can not be maintained in this State upon a judgment rendered in Pennsylvania upon returns of *nihil* to two successive writs of *scire facias* issued to revive the judgment, where the defendant at the time of the issuing of the writs was a resident of Indiana, and out of the jurisdiction of the court that rendered the judgment.

Dunn v. Dilks, 673.

11. *Foreign Judgments. — Jurisdiction.* — A complaint to enforce a judgment against an insurance company of this State obtained in another state averred that the writ was personally served upon the deputy insurance commissioner. The statute of the foreign state pleaded provides that process shall be served on the insurance commissioner, or the party designated by him, or the agent specified by said company to receive services of process. It was averred that the deputy was "legally authorized" and asserted that by a different section the deputy insurance commissioner was em-

JUDGMENT—Continued.

powered to perform the acts attached to the office in certain contingencies, but the section of the statute was not pleaded. *Held*, that the facts pleaded show that the court rendering the judgment did not have jurisdiction of the defendant.

Old Wayne Mut. Life Assn. v. Flynn, 473.

12. *Foreign Judgments.—Enforcement.—Jurisdiction of Court.*—The presumption of the jurisdiction of a court of record and general jurisdiction of another state of the subject-matter and of the parties does not arise where the averments of the pleading seeking the enforcement of the judgment states the facts on which jurisdiction depends. *Old Wayne Mut. Life Assn. v. Flynn*, 473.

JURISDICTION—Of justice of the peace, see **JUSTICES OF THE PEACE**; *Everett Piano Co. v. Bash*, 498.

When cause within jurisdiction of justice of the peace, see **APPEAL AND ERROR**, 1-3; *Everett Piano Co. v. Bash*, 498.

JURY—

Right to Jury Trial.—Abatement of Nuisance.—Injunction.—A party is not entitled to a jury trial as of right in a suit to enjoin and abate a nuisance. *Shroyer v. Campbell*, 83.

JUSTICES OF THE PEACE—

Jurisdiction.—The clause of §1500 Burns 1901 giving justices of the peace jurisdiction to the extent of \$100 is surplusage as to the amount stated, and, under this statute, justices of the peace have original jurisdiction in actions of contracts or tort, where the debt or damage claimed, or the value of the property sought to be recovered, does not exceed \$200, and have jurisdiction to enter judgment by confession to the amount of \$300.

Everett Piano Co. v. Bash, 498.

LACHES—See **EQUITY**.

LANDLORD AND TENANT—Damages for wrongful eviction, see **DAMAGES**, 1; *Paxson v. Dean*, 46.

Royalties under oil lease go to devisee of life estate, see **LIFE ESTATES**; *Andrews v. Andrews*, 189.

1. *Defective Premises.—Personal Injuries.—Damages.*—An action may be maintained by a tenant against his landlord for personal injuries received by the breaking of defective steps leading to the house, where the house consisted of different apartments or tenements rented to two tenants, and the landlord kept possession of and exercised dominion over the steps as a common passageway for the tenants occupying the premises. *LaPlante v. LaZear*, 433.
2. *Gas Lease.—Notice to Quit.*—Where the consideration for a lease consisted of a certain sum payable annually in advance and the use of gas in lessor's dwelling-house, the failure of lessee to pay the rent did not entitle the lessor to possession of the premises without notice while he continued the use of the gas.

King v. Morristown Fuel, etc., Co., 476.

LEASE—See **LANDLORD AND TENANT**.

LENT SERVANT—Injury to servant in construction of elevator in factory by independent contractor, see **MASTER AND SERVANT**, 8; *Parkhurst v. Swift*, 521.

LETTER—As evidence, see EVIDENCE, 2; *Halstead v. Coen*, 302.

LIBEL AND SLANDER—See SLANDER.

LICENSE—See INTOXICATING LIQUORS.

Action to enjoin payment of school teacher who taught without license, see SCHOOLS; *McGreggor v. State, ex rel.*, 483.

LIENS—See LIMITATION OF ACTIONS; VENDOR AND PURCHASER.

Decree for maintenance of child, see DIVORCE; *Matthews v. Wilson*, 90.

LIFE ESTATES—Action for waste, see PARTIES; *Halstead v. Coen*, 302.

Will construed to give life estate, see WILLS, 1; *Thompson v. Jamison*, 376.

Royalties from Oil-Wells.—Gas and Oil Lease.—Where testator leased lands for oil, and two oil-wells were in operation at the time of his death, the devisee of the life estate is entitled to the royalties accruing from wells drilled under the provisions of the lease, after the death of testator, as well as from those drilled prior to the death of testator. *Andrews v. Andrews*, 189.

LIMITATION OF ACTIONS—Action against recorder for mistake in recording mortgage, see MORTGAGES, 7, 8; *State, ex rel. v. Walters*, 77.

1. *Divorce Decree.—Lien for Support of Child.*—A lien against the real estate of the defendant in a divorce proceeding, to secure the payment of an allowance for the support of a minor child, is barred by the statute of limitations after ten years.

Matthews v. Wilson, 90.

2. *Pleading.—Amendment.*—Where the amended pleading states a different cause of action from that stated in the original complaint it can not be made to relate back to the time of filing the original so as to defeat the operation of the statute of limitations; but an amendment which amounts to a restatement of the original cause of action does relate back to the filing of the original. *Shroyer v. Pittenger*, 158.

3. *Pleading.—Amendment.—Presumption.*—Where the record shows that the pleading filed was "an amended complaint," it will be presumed, in the absence of some showing to the contrary, that it was a restatement of the original cause of action.

Shroyer v. Pittenger, 158.

MALICIOUS PROSECUTION—

1. *Complaint.—Proof.*—In an action for malicious prosecution it is essential for the plaintiff to aver and prove that the prosecution complained of was instituted maliciously and without probable cause. *Lawrence v. Leathers*, 414.

2. *Malice.—A Question of Fact.*—In an action for malicious prosecution, malice is a question of fact for the jury.

Lawrence v. Leathers, 414.

3. *Probable Cause a Question of Law.*—The existence or non-existence of probable cause, upon the facts found by the jury, in an action for malicious prosecution, is a question of law for the court, and it is the duty of the court, the facts being uncontradicted, to instruct the jury as to whether probable cause did or did not exist. *Lawrence v. Leathers*, 414.

MALICIOUS PROSECUTION—Continued.

4. *When Arrest Justified.*—The belief that justifies accusation and arrest must be founded upon facts and circumstances that would induce a reasonable and prudent man, mindful of the right of individual security possessed by every citizen, to act.
Laurence v. Leathers, 414.
5. *Defense.—Acting on Advice of Attorney.*—The procuring of an arrest, upon the advice of a prosecuting attorney, is not a defense in an action for malicious prosecution, unless a correct statement of the facts were given to the attorney.
Laurence v. Leathers, 414.
6. *One Partner not Liable for Act of the Other.*—The fact that one of two joint owners of a certain boarding-house was guilty of the malicious prosecution of a guest, will not render the other liable in an action for damages.
Laurence v. Leathers, 414.

MALPRACTICE—Skill required of physician, see **PHYSICIANS**, 1;
Thomas v. Dabblemont, 146.

MARRIED WOMEN—See **HUSBAND AND WIFE**.

MASTER AND SERVANT—Assigning dangerous work to young and inexperienced employe, see **NEGLIGENCE**, 7; *Brower v. Locke, 353.*

1. *Negligence.—Violation of Statute.*—The employer can not put upon the employe the risks that arise from the employer's violation of a statute.
Brower v. Locke, 353.
2. *Defective Brakes on Hand-Car. — Proximate Cause.*—Plaintiff averred in his complaint that he was one of a number of section hands on defendant's railroad; that at the close of the day's work he and five of his co-employees boarded a hand-car and started to a city six miles distant; that other co-employees to the number of from eight to twelve boarded a second hand-car, larger and swifter than the first, and followed in close proximity to the first; that by reason of defective brakes the second car became unmanageable, and ran into and derailed the first, causing plaintiff's injuries. On the trial the evidence as to whether the brakes were defective was conflicting, but there was no evidence whatever showing an attempt on the part of those in charge of the car to use the brakes. *Held*, that the defective brakes were not the proximate cause of the injury as alleged in the complaint, and that there could be no recovery.
Baltimore, etc., R. Co. v. Henderson, 441.
3. *Defective Appliance.—Knowledge of Master.—Complaint.*—A complaint for personal injuries received by plaintiff while assisting in the laying of a pipe-line, under the direction of a foreman, which alleges that the injury occurred because of the weak and insecure condition of the blocking and scaffolding constructed by defendant's superintendent and foreman, is sufficient without alleging specifically that the defendant had knowledge of the defects.
Indiana Nat. Gas, etc., Co., v. Vauble, 370.
4. *Section Hands.—Fellow Servants.*—Gangs of section hands employed during the day by the same railroad company, and who were proceeding homeward on two hand-cars after the close of the day's work, were fellow servants.
Baltimore, etc., R. Co. v. Henderson, 441.
5. *Defects.—Assumption of Risks.*—A verdict for plaintiff for injuries received while operating defective machinery will not be

MASTER AND SERVANT—Continued.

reversed on the ground that plaintiff assumed the risk, where it does not appear that the defects and consequent danger were obvious, since plaintiff was not required to look for defects that might possibly exist. *Brower v. Locke, 353.*

6. *Assumption of Risk.*—Decedent was directed to work at scabbling stone on a car standing on a side-track on an incline, and, in making up a train, the car was started down the track, and decedent jumped and was killed. It appeared that the wheels of the car were not blocked as they should have been when left standing in such position. *Held*, that the duty of decedent was a question of fact, and it can not be declared as a matter of law that it was his duty to examine the wheels and ascertain whether they were properly blocked.

Chicago, etc., R. Co. v. Martin, 308.

7. *Assumption of Risk. — Knowledge.*—Mere knowledge of the existence of the risk does not in all cases raise the presumption that the servant has agreed to assume it.

Chicago, etc., R. Co. v. Martin, 308.

8. *Injury to Lent Servant.—Independent Contractor.—Construction of Elevator.*—Defendants contracted to construct an elevator in a factory of a paper company for a certain sum, and sent their agent to construct same. The paper company agreed with the agent to furnish three men, including plaintiff, to assist in constructing the work, and to deduct the cost of their labor from the contract price. The agent assisted in the work, and in so doing removed a brace from a scaffold which rendered same dangerous, and liable to fall. He directed plaintiff to saw an opening in the second floor, and while he was so at work, directed another servant to go upon the top of the scaffold and oil machinery. The scaffold gave way and a portion thereof fell and struck plaintiff, injuring him. *Held*, that defendants were liable for the injuries sustained by plaintiff.

Parkhurst v. Swift, 521.

9. *Personal Injuries.—Action by Minor.—Complaint.*—In an action for personal injuries sustained by plaintiff while operating certain machinery of defendant, averments that plaintiff "was fifteen years old, inexperienced in mechanical labor, and incapable and incompetent to judge of the danger incident to the operation of such machinery," do not supply the place of an averment of negligent failure to instruct plaintiff in the use of the machinery.

Indiana Mfg. Co. v. Wells, 460.

10. *Factory Act.—Failure to Guard Machinery.—Negligence.*—Under §9 of the factory act of 1899 (Acts 1899, p. 231), an averment that defendant failed to guard properly his machinery is a sufficient charge of negligence.

Indiana Mfg. Co. v. Wells, 460.

11. In an action for personal injuries alleged to have been caused by the negligent failure of the master to guard dangerous machinery and to provide belt-shifters, a complaint which fails to allege plaintiff's want of knowledge of the condition of the machinery and the dangers resulting therefrom does not state a cause of action under the common law.

Indiana Mfg. Co. v. Wells, 460.

12. *Factory Act.—Failure to Provide Belt-shifters.*—Under the factory act of 1899, the mere failure to provide belt-shifters does not create a liability, the liability for such failure arises when the inspector's order to furnish them has not been complied with.

Indiana Mfg. Co. v. Wells, 460.

MASTER AND SERVANT—Continued.

13. *Defective Appliance.—Knowledge of Servant.—Instruction.—When Defective Instruction Not Cured by Others.*—In an action by a servant for injuries sustained while in the employ of defendant in the laying of a pipe-line, charging that the cause of the injury was the defective construction of certain blocking and scaffolding, an instruction which undertakes to enumerate certain facts which, if proved, will authorize a verdict for plaintiff, is erroneous if it omits all reference to plaintiff's knowledge or means of knowledge of the defects; and such instruction is not cured by another instruction which states the law correctly.

Indiana Nat. Gas, etc., Co. v. Vauble, 370.

MAXIMS—

Certum est quod certum reddi potest: That is fixed or determined which can be reduced to a certainty. *Brown v. Reeves & Co., 517, 518.*

Expedit reipublicae ut sit finis litium: It is for the public good that there should be an end of litigation. *Matthews v. Wilson, 90, 97.*

MERGER—Of note in judgment, see JUDGMENT, 9; *Dunn v. Dilks, 673.*

MISTAKE—Setting aside judgment because of, see JUDGMENT, 4; *Syfers v. Keiser, 6.*

Clerical error as to amount of damages, see JUDGMENT, 5; *Equitable Trust Co. v. Milligan, 20.*

MORTGAGES—See CHATTEL MORTGAGES.

Of wife's land for living expenses, see HUSBAND AND WIFE, 1; *Herbert v. Rupertus, 553.*

Foreclosure of building and loan association mortgage, see BUILDING AND LOAN ASSOCIATIONS, 4; *Noah v. German-American Building Assn., 504.*

1. *Taken in Name of Nonresident to Avoid Taxation.—Validity.—Public Policy.*—A mortgage executed in proper form and duly recorded is not void on the ground of public policy because taken in the name of a nonresident by whom it was assigned to the real owner, and the assignment withheld from record, in order to avoid the payment of taxes. *Callicott v. Allen, 561.*

2. *False Representations Made to Wife.*—Where a wife was induced to sign a mortgage upon false representations that money to be furnished by the mortgagee would pay all the encumbrances upon the land, and that such mortgage would be the only mortgage remaining thereon, the mortgage was void as to her.

Ristine v. Clements, 338.

3. *Alteration of Instruments.—Evidence.*—Where in an action on a mortgage the defense was interposed that the mortgage was changed after its execution by inserting the words "in my storeroom at Bedford," and it was contended by plaintiffs that the change was ratified by the mortgagor, the court erred in refusing to permit plaintiffs to ask the mortgagor, on cross-examination, after she had testified in her examination in chief as to the execution of the mortgage, if it was not her intention when she executed the mortgage to mortgage the goods in her storeroom.

Cabell v. McKinney, 548.

MORTGAGES—Continued.

4. *Alteration of Instruments.—Instructions.*—An instruction to the effect that any knowledge of plaintiffs' attorney as to the alteration of a mortgage after its execution would in law be knowledge to plaintiffs themselves can not be complained of by plaintiffs on the ground that they were only chargeable with knowledge obtained by their attorney while in their employ, where the jury found that the attorney made the alteration complained of as plaintiffs' attorney. *Cabell v. McKinney, 548.*
5. *Execution.—Plea of Non Est Factum.—Instruction.—Alteration of Instruments.*—An instruction in the trial of an action to replevin certain goods under a chattel mortgage, in which a plea of *non est factum* was interposed, to the effect that if the mortgagor signed the mortgage before certain words were inserted therein and delivered it in that condition to plaintiff's attorney, then that would be the execution of the mortgage as it then existed, "but that if afterwards the attorney of plaintiff altered it by inserting the words 'in my storeroom in Bedford,' then before such instrument could be of any binding effect upon her, the mortgage would have to be delivered by her to the plaintiffs or their attorney with the words added" did not amount to reversible error, where other instructions given made it clear that the mortgagor had the power of ratification. *Cabell v. McKinney, 548.*
6. *Railroads.—After-Acquired Property.—Use.—Judgments.*—Land adjacent to the depot grounds of a railroad company occupied by buildings leased for postoffice, grocery, barber shop, and other purposes foreign to the necessary means of operating the railroad, did not pass as after-acquired property for purposes connected with or appertaining to the railroad by the foreclosure of a mortgage executed by the railroad company containing a clause including after-acquired property appertaining to the railroad, and was subject to sale under a judgment obtained against the railroad company after the execution of the mortgage. *Chicago, etc., R. Co. v. McGuire, 110.*
7. *Error in Recording.—Action Against Recorder.—Limitation of Actions.*—In recording a mortgage, the recorder negligently failed to copy correctly the description of the land, so that the mortgage was not notice, and was liable to be defeated in favor of any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration. More than six years thereafter, another mortgage was executed, and properly recorded, without notice on the part of the mortgagee of the prior mortgage. Neither the first mortgagee nor the recorder knew of the error in recording until after the execution of the second mortgage. *Held*, in an action against the recorder, that the statute of limitations began to run at the time the erroneous record was made, and that the action was barred by §294 Burns 1901. *State, ex rel., v. Walters, 77.*
8. *Error in Recording.—Limitation of Actions.—Discovery of Cause of Action.—Suspension of Statute.*—A county recorder in recording a mortgage failed to copy correctly the description of the land, and the mortgage was thereby rendered invalid against a subsequent mortgagee. Neither the first mortgagee nor the recorder knew of the error in recording until after the execution of the second mortgage. *Held*, that there was no concealment within the meaning of §301 Burns 1901, so as to suspend the operation of the statute of limitations. *State, ex rel., v. Walters, 77.*

MOTIONS—To make more specific, see PLEADING, 9; *Mulky v. Karsell*, 595.

To strike out pleading as sham, see PLEADING, 7; *Stars v. Hammersmith*, 610.

MUNICIPAL CORPORATIONS—

1. *Defective Streets.—Notice.—Proof.*—An averment in a complaint against a city for personal injuries sustained because of a defect in a sidewalk, that defendant had notice of the dangerous condition of the sidewalk for a long time prior to the date of the accident, was sufficient, and proof of actual notice by the city, of such defect was not necessary. *City of Linton v. Smith*, 546.
2. *Obstruction of Street.—Notice.—Contributory Negligence.*—A complaint against a town for personal injuries, caused by the alleged negligence of defendant in permitting a large flag to be suspended in a principal street, which frightened plaintiff's horse as she attempted to drive under it, and caused the horse to run away and injure plaintiff, shows, on its face, that plaintiff was guilty of contributory negligence in attempting to drive under the flag, and was bad against demurrer. *Town of Crown Point v. Thompson*, 195.
3. *Defective Bridge.—Notice.*—A city is chargeable with notice of a defect in a bridge, in a populous part of the city, consisting of a hole two feet long and six inches wide which had existed for three or four months. *City of Connersville v. Snider*, 218.
4. A city is liable in damages for failure to keep its bridges in a reasonably safe condition. *City of Connersville v. Snider*, 218.
5. *Annexation.—Appearance.—Notice.*—Where a property owner entered an appearance to a proceeding to annex territory to a town and filed a motion involving the merits of the proceeding, the appearance, notwithstanding the statement in the motion that it was special, was a general one, and amounted to a waiver of alleged defects in the notice. *McCoy v. Board, etc.*, 331.
6. *Annexation.—Evidence.*—The motives of an individual member of the board can not affect the right of the town to annex territory, and evidence of ill feeling of a member of the board toward the owner of property sought to be annexed was properly excluded. *McCoy v. Board, etc.*, 331.
7. *Annexation.—Evidence.*—Evidence in an annexation proceeding tending to show the relation of the real estate to the town, the business relations between the town and the owner of land sought to be annexed, and the mutual benefits arising therefrom, was competent. *McCoy v. Board, etc.*, 331.
8. *Petition.—Description of Property Sought to be Annexed.*—A petition for the annexation of contiguous territory to a town is not bad for failure to contain a description of the territory sought to be annexed, where an exhibit filed with the petition contained a description of the property. *McCoy v. Board, etc.*, 331.
9. *Annexation.—Petition.*—A petition for the annexation of adjoining lands to a town alleging that the persons residing in the territory sought to be annexed have all the advantages of the town and its institutions including public school privileges, police and fire protection; that the territory sought to be annexed is contiguous to the town; that there is no public way for ingress thereto or egress therefrom except over and along the streets of the town, which have been improved by the town at great expense, is sufficient. *McCoy v. Board, etc.*, 331.

MUNICIPAL CORPORATIONS—Continued.

10. *Annexation.—Amendment of Petition.*—No error was committed by the circuit court in an annexation proceeding in permitting an amendment of the petition to be made by omitting therefrom part of the lands originally included therein.
McCoy v. Board, etc., 331.
11. *Vacation of Street.—Injunction.*—A complaint by a property owner upon a street, but not abutting the part sought to be vacated, is insufficient to entitle plaintiff to injunctive relief, where the facts pleaded do not show that any special damages will result to plaintiff's property by the proposed vacation.
Hall v. City of Lebanon, 265.
12. *Vacation of Street.—Objection by Property Owner.*—A person competent to object to the vacation of a street as a property owner, under §§3648, 3650 Burns 1901, must be a property owner immediately upon the street or the part thereof to be vacated.
Hall v. City of Lebanon, 265.
13. *Liability for Care of Smallpox Patient.*—A person afflicted with smallpox of a malignant character was discovered in a populous part of the city. The city health officer was absent from the city and a physician with written authority from the health officer to act in his stead, and under the directions of the secretary of the state board of health, employed plaintiff to care for the patient, quarantined the house, and placed guards around the same. The city paid the guards, but refused to pay plaintiff's claim. Held, that the city is liable.
Monroe v. City of Bluffton, 269.

NATURAL GAS—

- Lease, see LANDLORD AND TENANT, 2; *King v. Morristown Fuel, etc., Co., 476.*
1. *Transportation by Artificial Means.—Injunction.—Increase of Flow from Wells.*—To entitle one interested in a common reservoir of natural gas to an injunction, under §§7507–7509 Burns 1901, restraining another from transporting natural gas therefrom by artificial means, it must be shown that the artificial means so used will increase the flow of gas from the wells.
Richmond Nat. Gas Co. v. Enterprise Nat. Gas Co., 222.
 2. *Transportation by Artificial Means.—Injunction.—Special Finding.—Appeal and Error.*—Where in a suit to enjoin the transportation of natural gas by artificial means the court found as an ultimate fact that the use of the pumps has the effect of increasing the general flow of gas from the wells, and also found the primary facts from which it appears that the use of the pumps would not increase the amount of gas coming from the wells, through the natural laws of flowage, the ultimate fact so found will be disregarded on appeal.
Richmond Nat. Gas Co. v. Enterprise Nat. Gas Co., 222.
 3. The use of pumps or compressors in the transportation of natural gas is not prohibited by §7507 Burns 1901, which provides that natural gas "shall not be transported through pipes at a pressure exceeding 300 pounds per square inch, nor otherwise than the natural pressure of the gas flowing from the wells," and an adjoining landowner tapping a common reservoir is not entitled to an injunction to restrain defendant from transporting gas by merely showing the use of the pumps, nor by showing that he is injured because the gas is being wastefully diminished by the use of the pumps.
Richmond Nat. Gas Co. v. Enterprise Nat. Gas Co., 222.

NEGLIGENCE—See CARRIERS; DAMAGES; MASTER AND SERVANT; RAILROADS; STREET RAILROADS.

In conducting public park, see STREET RAILROADS; *Indianapolis St. R. Co. v. Dawson*, 605.

1. *Complaint*.—A complaint for personal injuries will not be held insufficient because the act of negligence was charged in general terms, where no motion was made to make more specific.
South Chicago City R. Co. v. Zerler, 488.
2. *Personal Injuries*.—*Complaint*.—*Contributory Negligence*.—Though plaintiff in an action for personal injuries is not required to allege in his complaint nor to prove the want of contributory negligence, nevertheless if the statement of facts in the complaint shows plaintiff guilty of contributory negligence the complaint is insufficient.
Rich v. Evansville, etc., R. Co., 10.
3. *Carriers*.—*Complaint*.—*Proximate Cause*.—*Railroads*.—A complaint against a railroad company for damages for injury to a car load of horses alleging that it was the duty of defendant to place the car at the chute at the stock-yards upon arrival at its destination so that the stock might be unloaded, and that defendant not only failed so to place the car, but refused to do so when requested, and that, disregarding its duty and plaintiffs' request, the car was placed by defendant among other cars, away from the chute, and in a position where it was impossible to unload the horses, leaving the car and horses so situated until the next day, and during the time the horses were in defendant's charge, and while standing on the side-track they became and were injured, to such an extent that when they were unloaded from the car two of the horses died, and others were crippled, while showing negligence, does not show that the negligence charged was the proximate cause of the injury. *Toledo, etc., R. Co. v. Beery*, 556.
4. *Wilful Injury*.—*Complaint*.—A complaint for a wilful injury must allege that the injurious act was purposely and intentionally committed with the intent wilfully and purposely to inflict the injury complained of.
Union Traction Co. v. Lowe, 336.
5. A complaint for wilful injury being *quasi* criminal in its nature should be strictly construed.
Union Traction Co. v. Lowe, 336.
6. *Of City in Maintaining Defective Foot-Bridge*.—*Injury to Pedestrian*.—*Complaint*.—In an action against a city by a pedestrian for personal injuries, a complaint which sets forth that plaintiff was injured while attempting to pass over a foot-bridge which the city, having notice thereof, had negligently permitted to be and remain out of repair, is sufficient to withstand a demurrer, though the particulars of the alleged defect in the bridge are not specifically detailed.
City of Franklin v. Davenport, 648.
7. *Violation of Statute*.—*Master and Servant*.—The assignment of a young and inexperienced person to clean machinery while in motion, in violation of §7087i Burns 1901, is negligence *per se*. *Brower v. Locke*, 353.
8. *Proof of One of Several Acts of Negligence Charged*.—*Instructions*.—*Railroads*.—*Fires*.—Where in an action for damages for fire escaping from a locomotive the complaint charged that the fire was caused by a live coal or spark negligently emitted from the locomotive, that the spark-arrester was defective and that the engineer was operating the engine in a negligent manner, an instruction that plaintiff in order to recover must prove all of the acts of negligence charged was erroneous, as proof of either act of negligence shown to be the proximate cause of the injury was sufficient. *Indiana Clay Co. v. Baltimore, etc., R. Co.* 258.
9. *Cleaning Machinery While in Motion*.—*Children*.—Defendants are

NEGLIGENCE—Continued.

not relieved from liability for negligence, under §7087i Burns 1901, prohibiting the employment of persons under sixteen years of age to clean machinery while in motion, because of the fact that the part of the machine on which plaintiff was ordered to work was not in motion, where the parts of the machine designed to move were in motion. *Brower v. Locke*, 353.

10. *Proximate Cause.—Nearness in Point of Time.—Other Causes Operating Conjointly.*—The fact that a negligent act was nearest in point of time does not of necessity make it the efficient cause of the accident, nor is it a defense that some other cause operated conjointly with the negligent act complained of.

Chicago, etc., R. Co. v. Martin, 308.

11. To justify the court in setting aside a verdict for plaintiff on the ground that defendant's negligence was not the proximate cause of the injury, the absence of connection must be substantial, not merely fanciful.

Chicago, etc., R. Co. v. Martin, 308.

12. *Proximate Cause.—When Question for Jury.*—Where the facts are undisputed and but one conclusion can reasonably be drawn, their effect is to be determined as a matter of law by the court in the same manner as other issues between the parties; but where the inferential facts to be drawn from the main facts are in dispute, and there is room for different inferences among reasonable men, the question of proximate cause is for the determination of the jury.

Chicago, etc., R. Co. v. Martin, 308.

13. *Railroads.—Jumping Off Car to Avoid Apprehended Danger.—Sudden Peril.—Contributory Negligence.*—Decedent was scabbling stone on a car standing on a side-track on a down grade. The car was struck by a cut of cars and started down the incline, and decedent jumped and fell upon loose spalls, or stones, and slid down under the wheels of the car and was killed. The other employes jumped in the other direction and were not injured. It appeared that no injury would have happened if decedent had remained on the car, and that the rate of speed at which the train was moving was not so great as to preclude him from alighting safely had he jumped in the opposite direction. *Held*, the finding of the jury that decedent was free from contributory fault was not erroneous.

Chicago, etc., R. Co. v. Martin, 308.

14. *Licensee.*—Plaintiff's decedent who was employed by a stone company to dress stone while working on stone loaded on cars standing on a descending side-track was killed by the car starting down the incline. The only act of negligence proved against the railroad company was its failure to chock or block the wheels of the car. Decedent was not in the employ of the railroad company, and the railroad company had no interest in the stone quarry. *Held*, that decedent was a mere licensee of the railroad company and that defendant railroad company was not liable in damages for the injury resulting in his death.

Chicago, etc., R. Co. v. Martin, 308.

NEW TRIAL—Striking out interrogatories, see APPEAL AND ERROR, 29; Noah v. German-American Building Assn., 504.

1. *Causes.—Overruling Demurrer.*—The action of the court in overruling a demurrer to the complaint can not properly be made a cause in a motion for a new trial.

Helberg v. Hammond Bldg., etc., Assn., 58.

2. *Newly Discovered Evidence.—Cumulative Evidence.*—A new trial will not be granted on account of newly discovered evidence which is cumulative.

City of Linton v. Smith, 546.

NEW TRIAL AS OF RIGHT—

1. *Partition.—Oral Contract to Convey Real Estate.*—A new trial as of right will not be granted in a suit for partition, where defendant claims title to and possession of the real estate under an oral contract. *Schlichter v. Taylor, 164.*
2. *When Properly Denied.*—If two or more substantive causes of action proceed to judgment in the same case, whether properly or improperly joined, one being of the class in which a new trial as of right may be granted, and the other not, the latter will control the procedure, and a new trial as of right will be denied. *Krise v. Wilson, 590; Schlichter v. Taylor, 164.*
3. *Complaint.—Theory.*—In a suit between heirs, the first paragraph of complaint alleged that at the time the ancestor conveyed the lands in question to defendants he was of unsound mind, and that afterwards plaintiffs gave defendants written notice disaffirming the deeds, demanding a reconveyance, asking that the deeds be set aside; the second paragraph contained the same averments except instead of averring the unsoundness of mind of grantor, it was averred that "none of the deeds were delivered" to defendants, asking the same relief as the first; the third paragraph averred that the plaintiffs were the owners of an undivided one-fourth interest in fee in the lands in question as tenants in common, asking that their title be quieted. *Held*, that the title to the land was involved in each paragraph of complaint, and that defendants were entitled to a new trial as of right. *Krise v. Wilson, 590.*

NOTES—See BILLS AND NOTES.

NOTICE—Of claim of interest in real estate, see **VENDOR AND PURCHASER**, 7; *Blair v. Whittaker, 664.*

By city of defect in street, see **MUNICIPAL CORPORATIONS**, 1; *City of Linton v. Smith, 546.*

By city of defective bridge, see **MUNICIPAL CORPORATIONS**, 3; *City of Connersville v. Snider, 218.*

To agent, see **PRINCIPAL AND AGENT**; *Blair v. Whittaker, 664.*

Putting Party on Inquiry.—Whatever puts a party on inquiry amounts to notice. *Blair v. Whittaker, 664.*

NUISANCE—

1. *Intoxicating Liquors.—Injunction.*—Where, in a suit to enjoin as a nuisance a resort in which it was alleged intoxicating liquors were unlawfully sold, the evidence showed that the business conducted by defendant constituted a public nuisance which was specially injurious to the plaintiff, the continuation of the resort was properly enjoined without regard to the question as to the persons who made sales of intoxicating liquors in themselves unlawful. *Tron v. Lewis, 178.*
2. *What Constitutes.*—The erection of a stairway by tenants of a building so as to obstruct the rear entrance to rooms occupied by other tenants, and the creation of offensive odors by cooking and by throwing refuse matter in the alley in the rear of the building, constitute a nuisance within the meaning of §290 Burns 1901. *Shroyer v. Campbell, 83.*
3. *Mandatory Injunction.—Discretion of Court.*—In a suit to abate a nuisance and for an injunction, a mandatory order that a stair-

NUISANCE—Continued.

way which obstructed an entrance to plaintiffs' rooms be removed will not be reversed, where no abuse of discretion is shown.

Shroyer v. Campbell, 83.

4. *Evidence.—Harmless Error.*—In a suit by tenants who occupied a part of a building as storerooms against a tenant of another part of the building to enjoin and abate a nuisance consisting of a stairway which cut off light and ventilation from plaintiffs' rooms, and offensive and unhealthful odors created by defendant, there was no reversible error committed in permitting evidence to be introduced as to the rental value of the rooms occupied by plaintiffs if the premises were free from the annoyances about which complaint was made, where mere nominal damages were awarded, nor was defendant harmed by evidence showing the annual volume of business done by plaintiffs.

Shroyer v. Campbell, 83.

5. *Evidence.*—In a suit by tenants who occupied a part of a building as business rooms against tenants of another part of the building to abate a nuisance created by the latter consisting of an obstructing stairway and certain offensive and unhealthful odors, evidence that these odors were the subject of comment by plaintiffs' customers was competent as showing the nature and extent of the nuisance complained of, and the effect upon plaintiffs' business.

Shroyer v. Campbell, 83.

OIL LEASE—See LANDLORD AND TENANT.

OVERRULED CASES—*Madden v. Dunn*, 24 Ind. App. 505, see TRIAL, 8; *Wood v. Wack*, 252.

PARTIES—In action on judgment, see JUDGMENT, 7; *McCardle v. Aultman Co.*, 63.

Complaint must state cause of action in favor of all the plaintiffs, see PLEADING, 8; *Halstead v. Coen*, 302.

Life Estates.—Landlord and Tenant.—Action for Waste.—Testator by the terms of his will gave two-thirds of his lands to his children and one-third to his wife, during her life, and directed that no estate vest until his youngest child should arrive at twenty-one years of age and no partition should be made thereof until such time, giving his executor authority to lease the lands and collect the rents. *Held*, that the widow as administratrix with the will annexed, and as a devisee under the will, and the children of testator as devisees, were proper parties plaintiff in an action against the lessee of the lands for damages to the land and to enjoin the lessee from cutting and selling timber from the land.

Halstead v. Coen, 302.

PARTNERSHIP—One partner not liable for act of the other, see MALICIOUS PROSECUTION, 6; *Lawrence v. Leathers*, 414.

PARTY WALLS—

1. *Excavations.—Damages.—Complaint.*—A complaint for damages resulting from an injury to a wall located at the edge of an adjoining lot, caused by excavations made by the adjoining owner, which fails to allege that it was a party wall, that the excavating was negligently done, or the length of time the wall had stood, is bad against demurrer. *Payne v. Moore, 360.*
2. *Excavations.—Damages.—Knowledge.*—The fact that the lessee of a building had knowledge of excavations being made by an

PARTY WALLS—Continued.

adjoining owner which injured the wall of the building and did not interfere therewith would not relieve the adjoining owner from liability for injury to lessee's property.

Payne v. Moore, 360.

8. *Excavations.—Damages.—Action by Lessee.*—The fact that an excavation which injured a wall and damaged the property of a lessee of a building was made by the adjoining owner with the knowledge and consent of the owner and lessor of the building in which the damaged property was situated would not affect the right of the lessee to recover from the adjoining owner damages for the property destroyed.

Payne v. Moore, 360.

PAYMENT—By will, see ACCORD AND SATISFACTION; *Alerding v. Allison, 397.*

PHYSICIANS—As witnesses, see EXECUTORS AND ADMINISTRATORS, 5; INSURANCE, 4; *Ellis v. Baird, 295; Union Life Ins. Co. v. Jameson, 28.*

1. *Skill Required.—Malpractice.*—A physician is bound to possess and exercise only the average degree of skill possessed and exercised by members of the medical profession practicing in similar localities.
2. *Malpractice.—Assault.—Joinder of Causes.*—In an action against a physician for malpractice, damages for assault may be demanded in a separate paragraph of complaint.

Thomas v. Dabblemont, 146.

Thomas v. Dabblemont, 146.

PIPE LINES—Condemnation for, see EMINENT DOMAIN, 1, 2; *Muncie Nat. Gas Co. v. Allison, 50.*

PLEADING—Filing amended complaint without leave, see APPEAL AND ERROR, 35; *Chappell v. Jasper County Oil & Gas Co., 170.*

Amendment of complaint pending trial, see APPEAL AND ERROR, 34; *Union Traction Co. v. Barnett, 467.*

Withdrawal, see APPEAL AND ERROR, 32; *Chappell v. Jasper County Oil & Gas Co., 170.*

As to complaint for personal injuries, see DAMAGES, 2; *City of Connersville v. Snider, 218.*

Conditions precedent, see BENEFICIAL ASSOCIATIONS, 3-5; *Grand Lodge A. O. U. W. v. Hall, 107.*

As evidence, see APPEAL AND ERROR, 39; *Webb v. Hammond, 613.*

When complaint will be considered as amended to conform to proof, see APPEAL AND ERROR, 33; *Whittern v. Krick, 577.*

1. *Theory.—How Determined.*—The substantive facts pleaded, and not the prayer for relief, nor the name given to the action by the pleader, determine the nature of the cause of action; but where the prayer for relief is consistent with the facts pleaded, it is proper to consider it with the facts averred to determine the nature and character of the action.
2. *Foreign Statute or Ordinance.—Action for Damages.*—Where an action for damages is instituted in this State, which action accrued in another state, and it is sought to take advantage of

Krise v. Wilson, 590.

PLEADING—Continued.

a statute or ordinance of the state where the action accrued, the statute or ordinance must be pleaded and proved.

Baltimore, etc., R. Co. v. Ryan, 597.

3. *Amendment.*—Where, upon the sustaining of a demurrer to a complaint consisting of a single paragraph, the plaintiff filed "an amended second paragraph of complaint by leave of court first had and obtained," the complaint filed under such leave will be regarded as an amended complaint, and, being so considered, it must be regarded as an amendment of the complaint originally filed, hence the original no longer constitutes a proper part of the record on appeal, and the error, if any, in sustaining the demurrer, must be treated as waived.

Worl v. Republic Iron & Steel Co., 16.

4. *Complaint on Fire Insurance Policy.—Reply.—Departure.*—To a complaint on a fire insurance policy for damages to a dwelling-house, the defendant insurance company answered that the plaintiff was not the owner of the property insured at the time the policy was issued, and that the policy by its terms was thereby rendered invalid. *Held*, that a reply which admitted that the records in the county recorder's office showed that plaintiff had deeded the property to another, but that the deed was without consideration, had never been delivered, and was made and recorded without the knowledge of the grantee, was not bad as being a departure from the complaint.

Franklin Ins. Co. v. Feist, 390.

5. *Complaint on Fire Insurance Policy.—Variance.*—The complaint on a fire insurance policy described the property insured as a dwelling situated on lot number twenty-five in "McTeagert's addition" to a certain city, while the policy showed that the defendant insurance company agreed to insure against loss by fire a dwelling situated on lot twenty-five in "McTeagert's fifth addition to said city." *Held*, that the variance might have been good ground for objection to the introduction of the policy in evidence, but did not make the complaint bad.

Franklin Ins. Co. v. Feist, 390.

6. *Conversion.—Counterclaim.*—In an action for conversion, a counterclaim by defendant, based upon alleged facts in no way connected with the acts of conversion complained of, is properly stricken out.

Nickey v. Zonker, 88.

7. *Sham Pleading.—Motion to Strike Out.—Examination of Adverse Party.*—A complaint can not be stricken out as sham pleading upon answers to questions propounded to a party, pursuant to §517 Burns 1901, providing for the examination of an adverse party as witness.

Stars v. Hammersmith, 610.

8. *Parties.—Demurrer.*—A complaint, to withstand a demurrer for want of sufficient facts, must state a good cause of action in favor of all the plaintiffs who have joined in bringing the action.

Halstead v. Coen, 302.

9. *Remedy for Defective Statement.*—The remedy for a defective statement in a complaint of a material fact is by motion to make more specific, not by demurrer.

Mulky v. Karsell, 595.

10. *Misjoinder of Causes of Action.—Demurrer.*—A misjoinder of causes of action is not reached by demurrer for want of sufficient facts.

Shroyer v. Pittenger, 158.

11. *Demurrer.—Form.*—A demurrer to a complaint "for the reason that said complaint does not state a cause of action," though not in the form of the statute, is sufficient to question the complaint under the fifth statutory cause.

Toledo, etc., R. Co. v. Beery, 556.

PLEADING—Continued.

12. *Harmless Error*.—Where the material facts set up in an answer were provable under the general denial which was filed, error in sustaining a demurrer thereto was harmless. *Payne v. Moore*, 360.
13. *Verdict in Excess of Demand*.—*New Trial*.—That the verdict is for an amount in excess of the demand in the complaint can not be presented by motion for new trial, where the facts stated and the evidence entitle the plaintiff to recover the amount found.
Noyes Carriage Co. v. Robbins, 300.
14. *Verdict in Excess of Demand*.—*Presumption on Appeal*.—Where the verdict returned was for an amount in excess of that demanded in the complaint, and there was evidence sustaining the verdict, the demand made in the pleading will be deemed, on appeal, to have been amended to meet the amount of damages proved and found in favor of the plaintiff. *Noyes Carriage Co. v. Robbins*, 300.
15. *Proof*.—*Negligence*.—*Joint Action*.—*Variance*.—Plaintiff alleging joint negligence in an action against a railroad company and a stone company is not bound to proof of joint management, the right of recovery in such case being regulated by the proof, and not by allegations of the complaint.
Chicago, etc., R. Co. v. Martin, 308.

PRINCIPAL AND AGENT—

Notice to Agent.—Notice to an agent for the purchaser of real estate is notice to the purchaser. *Blair v. Whittaker*, 664.

PRIVILEGED COMMUNICATIONS—Between attorney and client, see WITNESSES, 1; *George v. Hurst*, 660.

PROCESS—When service of process will be presumed, see APPEAL AND ERROR, 46; *Union Traction Co. v. Barnett*, 467.

PROMISSORY NOTES—See BILLS AND NOTES.

PROXIMATE CAUSE—A question for the jury, see NEGLIGENCE, 12; *Chicago, etc., R. Co. v. Martin*, 308.

In action for damages to stock in transit, see NEGLIGENCE, 3; *Toledo, etc., R. Co. v. Beery*, 556.

Of injury to employe on hand-car, see MASTER AND SERVANT, 2; *Baltimore, etc., R. Co. v. Henderson*, 441.

PUBLIC POLICY—Contracts void against, see CONTRACTS, 1; *Callicott v. Allen*, 561.

Mortgage taken in name of nonresident to avoid taxation, see MORTGAGES, 1; *Callicott v. Allen*, 561.

QUIETING TITLE—As against building and loan mortgage, see BUILDING AND LOAN ASSOCIATIONS, 1; *Home Savings Assn. v. Noblesville, etc., Church*, 115.

1. *Tax Sale*.—*Description*.—A description of real estate in a notice of tax sale and certificate of sale as "lot one, Col. W. Co." is too indefinite and uncertain to support a suit to quiet title.
Brown v. Reeves & Co., 517.
2. *Complaint*.—*Gas and Oil Lease*.—A complaint against a lessee to quiet title which shows on its face that the lease had expired before the action was brought, and it is not shown that the lessee was contending that the lease, in any manner, affected

QUIETING TITLE—Continued.

the real estate at the time the action was commenced, or that plaintiff was the owner of any right, title, or interest in the real estate upon which the alleged lease was executed, is insufficient. *Indiana Nat. Gas & Oil Co. v. Sexton*, 575.

3. *Evidence Admissible Under General Denial.*—In a suit to quiet title, the defendant may, under the general denial, introduce evidence tending to show a mistake in the description of the real estate contained in the conveyance under which he claims.

Wieneke v. Deputy, 621.

4. *Ejectment.—Cross-Complaint.—Offer to Convey.*—Plaintiff and defendant were in possession of adjoining tracts of land known as the "west acre" and the "middle acre" respectively. Each had a deed for the tract in possession of the other. Plaintiff brought suit for possession of the west acre, and to quiet title. Defendant filed cross-complaint to quiet title, setting up that by mistake of the grantor, who owned both tracts at the time, the middle instead of the west acre was described. *Held*, that without an offer to make deed of conveyance to plaintiff for the "middle acre" the defendant could not recover on his cross-complaint.

Wieneke v. Deputy, 621.

5. *Notice of Vendee's Agent as to Former Conveyances.—Sufficiency of Evidence.*—In a suit to quiet title, the evidence showed that the real estate in controversy was a part of a tract of land, a life estate in which had been devised by testator to his wife and the fee to his children; that the children executed to plaintiff a deed which after delivery was returned to the justice of the peace before whom it had been acknowledged, and by whom an important correction was made; that before the deed was returned and recorded, and more than forty-five days after its execution, the grantors gave a warranty deed for the same tract of land to one Stewart who executed and delivered to plaintiff a warranty deed therefor, which latter deed was lost and never recorded; that thereafter the testator's said children conveyed to defendant adjoining lands, and unintentionally the land in controversy was included. Conversations with defendant's agents at the time of the last conveyance, admitting knowledge of the former conveyances of the land by the same grantors, were introduced in evidence, but such conversations were denied by the agents. *Held*, that the trial court was warranted in finding that defendant's agents had notice of the prior conveyances before the transfer to defendant, and that defendant took his conveyance charged with knowledge of plaintiff's right under the unrecorded deeds.

Blair v. Whittaker, 664.

RAILROADS—See CARRIERS; STREET RAILROADS.

Mortgaging after-acquired property, see MORTGAGES, 6; *Chicago, etc., R. Co. v. McGuire*, 110.

Negligence in causing fire, see NEGLIGENCE, 8; *Indiana Clay Co. v. Baltimore, etc., R. Co.*, 258.

Injury to licensee, see NEGLIGENCE, 14; *Chicago, etc., R. Co. v. Martin*, 308.

1. *Crossings.*—Where a railroad in process of construction commences proceedings to acquire the right to cross the tracks of an established operating railroad, the crossing over grade, under grade or at grade refers to the crossing by the new road of the old. *Baltimore, etc., R. Co. v. Wabash R. Co.*, 201.

RAILROADS—Continued.

2. *Crossings.—Agreement.*—Railroads have the right to agree as to the manner of making crossings and proceed with the work without going into court, and may, when a proceeding is brought in court to establish a crossing, agree upon the terms under which their respective rights shall be determined, and an agreement so entered into, will, in the absence of fraud, be enforced.
Baltimore, etc., R. Co., v. Wabash R. Co., 201.
3. *Crossings.*—Pending a proceeding by plaintiff to condemn a crossing over the tracks and right of way of defendant an agreement was entered into by the parties to submit to commissioners the question whether a grade or over-grade crossing should be established. *Held*, that a crossing by carrying the tracks of plaintiff under the tracks of defendant was not within the meaning of the agreement of submission.
Baltimore, etc., R. Co. v. Wabash R. Co., 201.
4. *Injury to Licensee.—Contributory Negligence.*—Plaintiff, who was sixty years old and in full possession of his faculties, went to a railroad station to meet a train. After the arrival of the train, and before it pulled out, plaintiff left the depot, walking between the main track and a side-track, which space the public was licensed to use as a footway. The train followed in the same direction and struck plaintiff who was walking too near the track and not looking nor listening for the train at the time. Plaintiff knew the train would proceed in the direction and at the time it did, and was familiar with the tracks, crossings, and surroundings. *Held*, that the plaintiff was guilty of contributory negligence.
Hill v. Indianapolis, etc., R. Co., 98.
5. *Crossing.—Duty of Traveler to Look and Listen.—Misleading Acts on Part of Railroad Company.*—The failure of a railroad company to sound the whistle and ring the bell and to run the train on the siding, as had been its custom to do with such train, did not relieve a traveler approaching the crossing of the duty of looking and listening for the approach of trains before attempting to cross the track.
Rich v. Evansville, etc., R. Co., 10.
6. *Action for Damages Accruing in Another State.—Effect of Foreign Statute.*—Where a citizen of Indiana brings suit in a court in his own State, the action having accrued in a city in the state of Illinois, he is entitled to the benefit of an Illinois statute relative to the use of whistles and bells on locomotives, and of a city ordinance of the foreign city concerning the maintenance by a railroad company of gates at street crossings.
Baltimore, etc., R. Co., v. Ryan, 597.
7. *Fires Escaping from Right of Way.—Damages to Land not Contiguous.—Complaint.*—A complaint against a railroad company for damages from fire to land not contiguous to defendant's right of way need not aver that the fire was negligently permitted to escape from the intervening land, where it contains the allegation that the fire was negligently permitted to escape from the right of way.
Wabash R. Co. v. Lackey, 103.
8. *Fires from Locomotives.—Duty of Owner of Property.*—An instruction in an action for damages caused by fire escaping from defendant's locomotive to plaintiff's buildings that if plaintiff or any of its officers or servants had knowledge of the fire it was its duty to extinguish it as speedily as possible was erroneous, as the law requires only reasonable efforts, under the circumstances proved, to prevent loss.
Indiana Clay Co. v. Baltimore, etc. R. Co., 258.

RAILROADS—Continued.

9. *Fires from Locomotives.—Contributory Negligence.—Instructions.*—An instruction in an action for damages to plaintiff's buildings, caused by fire escaping from defendant's locomotive, that the jury, in determining whether or not plaintiff was guilty of contributory negligence, might consider, along with the other circumstances of the case, the character and age of the shingles on the roofs of the buildings and their inflammable character, and also whether or not plaintiff maintained any water appliances at its plant at the time of the fire, was erroneous; since a person has the right to construct a building on any part of his property and enjoy the same without reference to the proximity of a railroad, and he is not required to keep his property in such condition as to guard against the negligence of the railroad company.
Indiana Clay Co. v. Baltimore, etc., R. Co., 258.

REFORMATION OF INSTRUMENTS—

1. *Contract.—Complaint.*—A complaint, in a suit to reform a contract, which contains a succinct statement of the contract as intended by the parties, and the agreement actually reduced to writing and signed, and pointing out the differences between the contract agreed upon and the one alleged to have been signed by mistake, is sufficient to withstand a demurrer.
Webb v. Hammond, 613.
2. *Rule of Equity.*—Equity will reform a written contract whenever through mutual mistake, or the mistake of one of the parties accompanied by fraud of the other, it does not, as reduced to writing, correctly express the agreement of the parties.
Webb v. Hammond, 613.
3. *Contract.—Sufficiency of Evidence.*—In a suit to reform a written contract, the proof is insufficient to sustain a judgment for plaintiff, where the provisions of the contract sought to be reformed were not proved.
Webb v. Hammond, 613.
4. *Parol Evidence.*—Parol evidence is admissible in suits for reformation, to establish the fact of the mistake, in what it consists, and to show how the writing should be corrected in order to conform to the agreement already made.
Wieneke v. Deputy, 621.

REHEARING—Too late to appear for first time and file brief after case has been decided, see **APPEAL AND ERROR** 49; *Town of Crown Point v. Thompson, 195.*

RELIGIOUS SOCIETIES—

Expulsion of Member.—Appellate Tribunal.—Under the provision of the constitution of a religious society, that upon appeal by a member who has been expelled from a local society no person shall sit as a member of the appellate tribunal who sat in judgment at the original trial, members of the local church society, or class, which expelled the member, and who were present at the time of the expulsion, though not voting, were not eligible as members of the appellate tribunal.
Hatfield v. DeLong, 210.

REMOVAL OF CAUSES—

1. *Amount in Controversy.*—The amount in controversy fixed by the specific demand in a complaint for damages at \$2,000 is not modified by the formal prayer "for all other and proper relief in the premises," there being no proper relief other than the pecuniary remedy demanded.
Baltimore, etc., R. Co. v. Ryan, 597.

REMOVAL OF CAUSES—Continued.

2. *Complaint in More than One Paragraph.—Amount in Controversy.*—Where it affirmatively appears on the face of the complaint that all of the paragraphs of a complaint, consisting of more than one paragraph, are based upon one and the same occurrence, the statement being varied merely to meet the evidence as it may appear on the trial, the amount of the one cause of action is controlling; and, if damages be not claimed in excess of \$2,000 in any of such paragraphs, the cause should not be removed to the federal court because of the amount in controversy.

Baltimore, etc., R. Co., v. Ryan, 597.

REPLEVIN—Answer in suit for, see **EXECUTIONS**, 1; *Small v. Finch, 18.*

Verdict.—Failure to Find Value of Goods.—Plaintiff in an action in replevin can not complain of the failure of the jury to find the value of the goods, where the verdict was for the defendant.

Cabell v. McKinney, 548.

RESTRAINT OF TRADE—As to contract prohibiting sale of liquors, see **INTOXICATING LIQUORS**, 5; *Sullivan v. Kohlenberg, 215.*

SALES—

1. *Delivery.*—The law only requires such a delivery as is consistent with the nature and situation of the thing sold, and with the relations of the parties to the sale. *Avery Mfg. Co. v. Emsweller, 291.*
2. *Threshing Machinery.—Delivery.*—Where threshing machinery sold was to be delivered at a designated place, but by a subsequent arrangement between the parties it was agreed that the machinery should be accepted as it stood, the buyer can not successfully defend an action on the purchase-money notes on the ground that the machinery had not been delivered to the place first designated. *Avery Mfg. Co. v. Emsweller, 291.*

SCHOOLS—

Teacher Without License.—Payment.—Injunction.—Neither §5903 nor §5911 Burns 1901, authorizes a suit by the State on the relation of the county superintendent of schools to enjoin a township trustee from paying a school teacher out of the school revenue for services rendered in teaching school, on the ground that the teacher was without license. *McGreggor v. State, ex rel., 483.*

SHAM PLEADING—Motion to strike out pleading as sham upon examination of plaintiff, see **PLEADING**, 7; *Stars v. Hammersmith, 610.*

SLANDER—

1. *Charge of Forgery.*—A charge of forgery is slanderous *per se*, and a complaint for slander in charging the forgery of a check is sufficient if the words used were calculated to cause the hearer to suspect that plaintiff was guilty of the crime. *Ruble v. Bunting, 654.*
2. *Evidence.*—In an action for slander in charging the forgery of a check, no error was committed in permitting plaintiff to give in evidence the check concerning which the charge of forgery was made, and to testify concerning it. *Ruble v. Bunting, 654.*
3. *Instruction.*—In an action for slander in charging plaintiff with the forgery of a check, the place where the check was cashed

SLANDER—Continued.

was not of the essence of the charge, and it was not error to omit same from an instruction purporting to state the material averments of the complaint. *Ruble v. Bunting*, 654.

SMALLPOX—Liability of city for care of smallpox patient, see **MUNICIPAL CORPORATIONS**, 13; *Monroe v. City of Bluffton*, 269.

SPECIAL FINDING—See TRIAL.

In suit for specific performance, see **SPECIFIC PERFORMANCE**, 2; *Kepler v. Wright*, 512.

SPECIAL VERDICT—See TRIAL.

SPECIFIC PERFORMANCE—Sufficiency of description of real estate in contract to support suit for specific performance, see **VENDOR AND PURCHASER**, 1; *Maris v. Masters*, 235.

Demand for deed not necessary, see **VENDOR AND PURCHASER**, 4; *Maris v. Masters*, 235.

Tender of purchase money, see **VENDOR AND PURCHASER**, 5; *Maris v. Masters*, 235.

Alternative judgment to convey or pay damages, see **VENDOR AND PURCHASER**, 6; *Maris v. Masters*, 235.

1. *Contract to Convey Land.—Complaint.*—Where, by the terms of a contract for the sale and conveyance of real estate, the payment of \$100 and the execution of a note and mortgage for the remainder of the purchase money was to precede the execution of the deed, but after the payment of a sum far in excess of \$100 the vendor repudiated the contract, a complaint by the vendee for specific performance is not bad for want of an averment that plaintiff had made or offered to make the note and mortgage.

Kepler v. Wright, 512.

2. *Contract to Convey Land.—Special Findings.—Conclusion of Law.*—A contract for the sale and conveyance of land provided that the vendee should take possession of the real estate and make specified monthly payments until \$100 of the purchase price had been paid, at which time the vendee was to execute a note and mortgage for the remainder of the purchase money and the vendor to execute a deed of conveyance. In a suit by vendee for specific performance, the court found specially that the vendee took possession of the land and made the payments as provided, and, when \$100 had been paid, demanded of vendor that he execute a deed, which was refused; that the vendee continued to make payments, until a sum far in excess of \$100 had been paid, when the vendor took forcible possession of the premises and has held possession ever since; that the total amount paid by the vendee, including the rental value of the premises after the vendee was dispossessed was equal to the full purchase price as stipulated in the agreement. It was further found that after the payment of the first \$100 by the vendee, the vendor voluntarily paid taxes on the property, a part of which had become delinquent. Held, that the findings justified the conclusion of law that plaintiff was entitled to a deed and to possession, and that the right to have his contract specifically enforced dated from the time he first demanded a deed.

Kepler v. Wright, 512.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STREET RAILROADS—Injury to passenger while alighting from car, see **CARRIERS**, 1; *Ft. Wayne Traction Co. v. Morvilius*, 464.

Injury to pedestrian, see **TRIAL**, 15; *Union Traction Co. v. Barnett*, 467.

Conspiracy to Assault Colored People at Company's Park.—Knowledge of Danger.—Liability.—Evidence.—Notice.—A street railway owned a park adjacent to a city where it maintained attractions for the public. The company had knowledge of a conspiracy on the part of certain persons to assault and insult colored people who might visit the park, but nevertheless transported plaintiff, a colored man, to the park without warning him of his danger. Upon arriving at the park, plaintiff was assaulted by the conspirators, the employes of the railway company, though present, making no attempt to interfere. *Held*, that the street railway company was liable; and that evidence of similar occurrences was admissible to show notice.

Indianapolis St. R. Co. v. Dawson, 625.

STREETS—Vacation, see **MUNICIPAL CORPORATIONS**, 11, 12; *Hall v. City of Lebanon*, 265.

SUBSTITUTION—Of heirs as parties on death of appellee pending appeal, see **APPEAL AND ERROR**, 47, 48; *Utter v. Kersey*, 25.

SUDDEN PERIL—Jumping off car to avoid apprehended danger, see **NEGLIGENCE**, 13; *Chicago, etc., R. Co. v. Martin*, 308.

SURETY COMPANIES—Bond of foreign company, see **EXECUTORS AND ADMINISTRATORS**, 1, 2; *Barricklow v. Stewart*, 446.

SURETYSHIP—Indorsement of note by married woman for benefit of her husband, see **HUSBAND AND WIFE**, 4; *John C. Groub Co. v. Smith*, 685.

TAXATION—Enjoining collection, see **INJUNCTION**, 3; *Parkinson v. Jasper County Tel. Co.*, 135.

Mortgage taken in name of nonresident to avoid taxation, see **MORTGAGES**, 1; *Callicott v. Allen*, 561.

1. *Omitted Property.—Corporations.*—Neither the county board of review nor the state board of tax commissioners have authority to reassess property assessed in previous years because of undervaluation in such previous years, nor to make an original assessment of property for previous years, as property omitted from taxation in such years, nor to increase the assessment of property for the current year because of omissions of previous years.

Parkinson v. Jasper County Tel. Co., 135.

2. *Telephone Companies.*—The scheme of taxation of telephone companies contemplates that the real estate, structures, machinery, fixtures, and appliances owned by the company shall be originally assessed by the local officials, and that such assessments may be reviewed, and property of such description omitted in the current year may be added by the county board of review, and that the remainder of the property, coming within the meaning of capital stock, shall be assessed by the state board by determining its value, and adding thereto the mortgage indebtedness, and from the amount so obtained subtracting the value of such tangible property locally assessed; the remainder being taken as the value of the cap-

TAXATION—Continued.

ital stock to be assessed by the state board; and if such tangible property has been omitted from local assessment and taxation for previous years, it is the duty of the local officials to assess such property so omitted, and to place it on the tax duplicates.

Parkinson v. Jasper County Tel. Co., 135.

TAX SALE—Description of real estate, see QUIETING TITLE, 1; *Brown v. Reeves & Co.*, 517.

1. *Description*.—Section 8601 Burns 1901 requires that land be advertised for tax sale by same description as on tax duplicate.

Brown v. Reeves & Co., 517.

2. *Imperfect Description*.—*Lien*.—Where in a suit to quiet title to lands under a tax sale certificate it appeared that defendant had obtained title through a sale and subsequent conveyance under a partition proceeding, and there was nothing of record to show that the land had been sold for taxes because of the imperfect description thereof, the court properly held that the tax sale was invalid and did not convey title, but that the lien of the State was transferred to plaintiff, and that he was entitled to a first lien for the amount he paid together with penalties and interest.

Brown v. Reeves & Co. 517.

TELEPHONE COMPANIES—Taxation of, see TAXATION, 2; *Parkinson v. Jasper County Tel. Co.*, 135.

TENDER—Of purchase money in suit for specific performance of contract, see VENDOR AND PURCHASER, 5; *Maris v. Masters*, 235.

THEORY—Of pleading, how determined, see PLEADING, 1; *Krise v. Wilson*, 590.

TOWNS—See MUNICIPAL CORPORATIONS.

TOWNSHIPS—

1. *Township Reform Law*.—*Repeal*.—The provisions of the township reform law (Acts 1899, p. 150) relative to the control and management of the affairs of the school townships are not repealed by the act of March 4, 1899 (Acts 1899, p. 424), authorizing township trustees to have charge of the educational affairs of their respective townships, employ teachers, provide schoolhouses, furniture, apparatus, etc., but the two acts should be construed *in pari materia*.

Lincoln School Tp. v. American School Furniture Co., 405.

2. *Issue of Warrants for Money Borrowed*.—*Statutes*.—*Repeal*.—Sections 8081, 8082 Burns 1901, providing that a township trustee shall procure an order from the board of county commissioners therefor before incurring a debt in excess of the particular fund on hand and to be derived from the tax assessed for the year in which the debt is to be incurred, was not repealed by the act of 1897 (Acts 1897, p. 222), and township warrants issued by a township trustee for money borrowed, without complying with the provisions of said statute, can not be enforced against the township.

Coombs v. Jefferson Township, 131.

TRESPASS—

Title.—*Special Finding*.—*Appeal*.—A judgment against a railroad company for damages for wrongfully entering upon plaintiff's land and removing a fence will not be reversed on the question of ownership of the land, where the special findings upon which

TRESPASS—Continued.

the conclusions of law were based showed the record title of the land to be in plaintiff, and no facts were stated showing title by adverse possession in defendant, there being evidence to sustain the findings. *Cleveland, etc., R. Co. v. Kepler, 1.*

TRIAL—Right to jury trial, see JURY; Shroyer v. Campbell, 83.

1. *Materiality of Evidence a Question of Law.*—The question as to whether evidence is material is a question of law, the determination of which, in a civil action, is solely with the court. *Nickey v. Zonker, 88.*
2. *Joint Tort-Ffeasor.—Separate Trials.*—Where action is commenced against two persons as joint tort-feasors, the defendants are not entitled to separate trials, although the plaintiff might have elected to sue the defendants separately. *Black v. Marsh, 53.*
3. *Evidence.—Instruction.*—Where, in the trial of an action against two defendants, a deposition is read which is not competent evidence against one of the defendants, such defendant has a right to an instruction limiting the deposition to the party against whom it is competent. *Black v. Marsh, 53.*
4. *Evidence.—Malicious Prosecution.*—In an action for malicious prosecution, the defendant in justification of his procuring plaintiff's arrest introduced a letter from a third party, and also called upon such third person to testify. *Held*, that by offering evidence supportive of the statements contained in the letter he thereby opened the door to plaintiff to introduce evidence to discredit the statements contained in the letter. *Lawrence v. Leathers, 414.*
5. *Special Finding.—Request.—Waiver.*—It is the duty of the court to find the facts specially upon proper request, but the right to a special finding may be waived by the party requesting it after the request is made. *Shroyer v. Campbell, 83.*
6. *Waiver.*—A request for special findings will be presumed, on appeal, to have been waived, where, without any objection made or exception taken, the court made a general finding and rendered a decree thereon. *Shroyer v. Campbell, 83.*
7. *Special Finding.—Motion to Modify.*—A motion to modify or strike out a special finding is not recognized by the code of procedure in this State, and such motion may be overruled or stricken out by the court. If the facts are found contrary to the evidence the remedy is by motion for a new trial. *Chappell v. Jasper County Oil & Gas Co., 170.*
8. *Recovery too Small.—Remedy.*—Where plaintiff claims that the jury's answers to interrogatories entitle him to an amount greater than the general verdict, his remedy is by motion for judgment *non obstante veredicto*, and not by motion for new trial. *Madden v. Dunn, 24 Ind. App. 505, overruled. Wood v. Wack, 252.*
9. *Conclusions of Law.—Motion to Modify Judgment.*—When a judgment conforms to the conclusions of law, a motion to modify the judgment can not prevail. *Kepler v. Wright, 512.*
10. *Conclusions of Law.—Surplusage.*—Where the judgment follows the conclusions of law as a whole, and the evidence is not in the record, no part of the conclusions can be considered as surplusage. *Chappell v. Jasper County Oil & Gas Co., 170.*
11. *Special Finding.—Conclusions of Law Without the Issues.*—The assignee of an oil lease brought suit to enjoin another, who claimed a lease of the same premises, from drilling for oil thereon. The original lessor was not made a party to the suit. *Held*, that

TRIAL—Continued.

conclusions of law as to the rights between the lessor and the assignee under the lease were without the issues, and erroneous.

Chappell v. Jasper County Oil & Gas Co., 170.

12. *General Verdict.—Answers to Interrogatories.—Conflict.*—Where the facts specially found by the jury in answers to interrogatories clearly show that the jury have erred in computing the amount of recovery fixed by the general verdict, the special findings control.

Wood v. Wack, 252.

13. If the antagonism between a general verdict and the answers to interrogatories returned therewith is not such as to be beyond the possibility of removal by any evidence admissible under the issues, the general verdict must stand.

Union Traction Co. v. Barnett, 467.

14. When the special finding of facts is irreconcilably in conflict with the general verdict, the former must control.

Hill v. Indianapolis, etc., R. Co., 98.

15. *General Verdict.—Answers to Interrogatories.—Conflict.—Injury to Pedestrian.—Street Railway.*—In an action by a pedestrian against a street railway company for injuries sustained while walking across a defective street, the jury returned a general verdict for the plaintiff, and answers to interrogatories showing that the defendant in laying its track had taken up and relaid the brick pavement at the street crossing, and in doing so had not set the bricks as close together as practicable, nor tamped down the gravel between the bricks solidly enough; that the street was lighted, and near the crossing where plaintiff was injured, a red lantern was burning; that the plaintiff was familiar with the street, and knew the work was being done, and knew the significance of the red light; that she crossed the street at the time without looking where she was walking; that there was no red light or danger signal immediately on the crossing to warn plaintiff that it was dangerous; and that plaintiff could not see the loose bricks which caused her to fall. Held, that the answers to interrogatories were not in irreconcilable conflict with the general verdict.

Union Traction Co. v. Barnett, 467.

16. *Imperfect Answers to Interrogatories by Jury.—Motion to Require Direct Answers.*—Where proper interrogatories are propounded to a jury, and they return a general verdict, it is the duty of the jury to answer the same in a direct and positive manner. Such answers as "Don't know," "So stated," or "It is so stated" are imperfect, and upon proper objection and motion the court should require the jury to retire and return proper answers.

Life Assurance Co. v. Haughton, 626.

17. *Instructions.—Number of Witnesses.—Preponderance of Evidence.*—It is not error for the trial court to refuse an instruction that would give or have a tendency to give the jury to understand that the preponderance of evidence is to be determined by the number of witnesses testifying on each side.

Fritzing v. State, ex rel., 350.

18. *Refusal of Correct Instructions.*—No error was committed in refusing instructions where instructions given by the court contained a full and complete statement of the law applicable to the issues and covered every point mentioned in the refused instructions.

Muncie Nat. Gas Co. v. Allison, 50.

19. The trial court may refuse to give instructions that are a substantial repetition of instructions already given.

Fritzing v. State, ex rel., 350.

ULTRA VIRES—When defense of may not be pleaded, see DEBT, ACTION OF; *Noah v. German-American Building Assn.*, 504.

VARIANCE—Between pleading and proof, see PLEADING, 15; *Chicago, etc., R. Co. v. Martin*, 308.

VENDOR AND PURCHASER—

1. *Description of Real Estate.—Specific Performance.*—A contract for the sale of real estate described the land as "Lot 30, Douglas Park," and the contract was dated at Indianapolis, Indiana. Held, that the description was sufficient to support a suit for specific performance, it being presumed, for the purpose of determining the sufficiency of the complaint, that the lot was located where the agreement was dated. *Maris v. Masters*, 235.
2. *Contract Executed at Different Times.*—A contract for the sale of real estate is not unenforceable because executed in two parts at different times, where it relates to the same transaction and appears to be intended as one instrument. *Maris v. Masters*, 235.
3. *Contracts.—Time Not Essence of Contract.*—In a contract for the sale of real estate acknowledging the receipt of \$100, and providing that \$50 should be paid on or before April 1, 1899, \$50 on or before May 1, 1899, \$100 on or before June 1, 1899, and \$100 on or before July 1, 1899, and when the vendee shall have paid all of the above sums the vendor shall execute a warranty deed, time was not of the essence of the contract so as to defeat a suit for specific performance because \$30 of the purchase money remained unpaid August 8, 1899. *Maris v. Masters*, 235.
4. *Specific Performance.—Demand.*—Where a contract for the sale of real estate provided that when certain payments of purchase money were made the vendor should execute a warranty deed, no demand for a deed was necessary, and when the purchaser tendered the last payment it was the duty of the vendor to execute the proper deed without any demand upon him. *Maris v. Masters*, 235.
5. *Specific Performance.—Tender of Purchase Money.*—In a suit for the specific performance of a contract to convey real estate upon the payment of the specified purchase money, a tender of the balance of the purchase money before bringing suit on condition that the deed be executed was sufficient, and not prejudicial to defendant. *Maris v. Masters*, 235.
6. *Specific Performance of Contract.—Alternative Judgment.—Damages.*—In a suit for the specific performance of a contract to convey real estate in which defendant's wife was not a party, a judgment requiring defendant to execute and deliver to plaintiff a warranty deed, signed by himself and wife, and, upon his failure to comply with such order, to pay plaintiff damages equal to the amount of purchase money paid and interest thereon was proper. *Maris v. Masters*, 235.
7. *Possession of Land.—Notice.*—Actual possession of lands under claim of title is sufficient notice of such claim to put others on inquiry as to the existence and nature of the claim. *Blair v. Whittaker*, 664.
8. *Contract.—Merger.—Evidence.*—Where a vendor pointed out the boundaries of a tract of land to a purchaser and afterwards executed a deed which did not cover the entire tract so pointed out, oral evidence of the statements made by the vendor is admissible to show that the deed did not cover the entire tract purchased. *Equitable Trust Co. v. Milligan*, 20.

VENDOR AND PURCHASER—Continued.

9. *Failure of Title.—Boundaries.—Caveat Emptor.*—Where a vendor in possession and claiming to be the owner of a tract of land, pointed out the lines and corners thereof to a prospective purchaser and thereby induced him to purchase the same at an agreed price, and after the delivery of the deed and the payment of the purchase money it was discovered that the deed did not cover the entire tract so pointed out and described, and that the vendor's title did not cover the entire tract, the purchaser may recover the pro rata value of the portion of real estate omitted from the deed. *Equitable Trust Co. v. Milligan, 20.*
10. *Vendor's Lien.*—The right to a vendor's lien does not depend upon the transfer of a perfect legal title, nor is a conveyance to the person making the purchase essential thereto. *Mulky v. Karsell, 595.*
11. *Vendor's Lien.—Assignment.*—The general assignment of a purchase-money note carries with it the lien, and the assignee may thereafter enforce the same. *Mulky v. Karsell, 595.*
12. *Vendor's Lien.—Enforcement.—Complaint.*—It is not necessary in a complaint to enforce a vendor's lien to negative the existence of facts amounting to a waiver of the lien. *Mulky v. Karsell, 595.*
13. *Vendor's Lien.—Complaint.—Subsequent Purchasers.—Notice.*—It is necessary in a suit to enforce a vendor's lien against subsequent purchasers to allege that the purchasers had notice of plaintiff's equity. *Mulky v. Karsell, 595.*
14. *Reconveyance by Warranty Deed to Satisfy Purchase-Money Mortgage.—Judgment.—Priority.—Judicial Sale.*—The mortgagor of land, in satisfaction of a purchase-money mortgage, reconveyed the land to the mortgagee, and the mortgagee, not knowing that there was on the land the lien of a judgment against the mortgagor, satisfied the mortgage. Thereafter the mortgagee conveyed the land by warranty deed to plaintiff. After the death of mortgagee, plaintiff brought suit to enjoin the levy of execution on the land by the judgment creditor and to revive the mortgage lien as prior to the judgment, and the court so decreed. The amount of the mortgage lien was fixed at the face of the mortgage less the rental value of the land while occupied by plaintiff. The judgment creditor bought the land at judicial sale, paying to plaintiff the amount of his mortgage lien. Subsequently plaintiff paid to the judgment creditor the amount of both mortgage and judgment and took an assignment of the certificate of sale in order to cut off certain other judgment liens existing on the land. *Held*, that the plaintiff could recover the amount of the judgment from the mortgagee's heirs, after his estate had been finally settled. *Whittem v. Krick, 577.*

VERDICT—See TRIAL.

In excess of demand of complaint, see PLEADING, 13, 14; *Noyes Carriage Co. v. Robbins, 300.*

Failure of record to show on which paragraph of complaint verdict rests, see APPEAL AND ERROR, 30; *Wabash R. Co. v. Lackey, 103.*

Directing verdict for plaintiff, see JUDGMENT, 8; *McCardle v. Aultman Co., 63.*

WAIVER—Error not discussed is waived, see APPEAL AND ERROR, 28; *Payne v. Moore, 360.*

WILFULNESS—Complaint for wilful injury, see **NEGLIGENCE**, 4, 5; *Union Traction Co. v. Lowe*, 386.

WILLS—Contract to compensate by providing for in will, see **EXECUTORS AND ADMINISTRATORS**, 9; *Alerding v. Allison*, 397.

Legacy in satisfaction of debt, see **ACCORD AND SATISFACTION**; *Alerding v. Allison*, 397.

1. *Construction.—Life Estate.*—A testator by three separate items of his will devised certain portions of his real estate to his three daughters "for and during the lifetime" of each respectively, and provided that upon the death of the daughters the lands were to go to their respective children in fee simple. Another item of the will provided that in the event one of the daughters should die leaving no child or children the lands devised to her should go to the children of the surviving daughters. *Held*, that the fact that one of the daughters was childless did not, under the will, give her a fee simple in the lands devised to her, and that she, as the other daughters, received but a life estate.

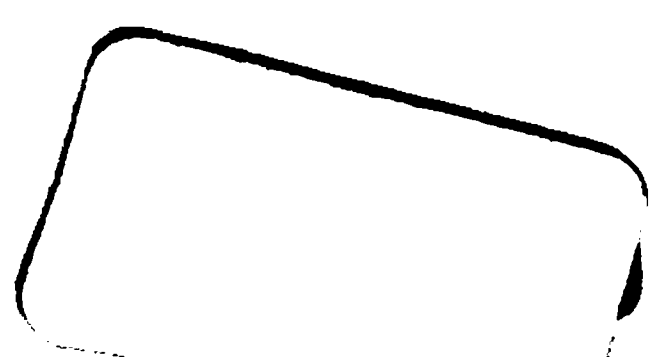
Thompson v. Jamison, 376.

2. *Construction.—Vested Estates.—Restraint Upon Alienation.*—Where a testator provided in his will that his real estate should be preserved unsold until his youngest child should arrive at the age of twenty-one years and until the end of that period neither of his devisees should have any power to convey any portion thereof, and that the fee in the land was not conveyed by such will so as to vest the title in the devisees named until the youngest child should arrive at the age of twenty-one years, and at such time two-thirds in value thereof should pass in fee to his children named, share and share alike, and one-third to his wife, during her natural life, and at her death to be partitioned among his children in the same manner as the two-thirds thereof, the fee in the lands, subject to the life estate of the widow, vested in the children at the death of testator, the limiting words constituting a restraint upon its alienation or partition until the youngest living devisee reached the age of twenty-one years.

Halstead v. Coen, 302.

3. *Remainders.—Vesting of Titles.—Life Estates.—Construction.*—A testator by the terms of his will gave all of his real estate to his wife during her life, subject to the support of his minor children named, two sons and two daughters, made the wife executrix, and guardian of the children, and provided that "after the death of my wife, I devise and bequeath my real estate to my said children in the following manner: (1) I give and devise to each of my said daughters one-eighth part of my real estate. (2) To each of my said sons I give and bequeath three-eighths of my real estate. The above bequests are subject to the life estate of my wife in the said real estate. * * * If any of my said children should die before they would be entitled to shares given them under this will then the survivors shall share equally the share of the one who is dead, unless the one who dies leaves lawful children surviving him or her." *Held*, that each of the children took a vested remainder at the death of the testator, the daughters each taking one-eighth, and the sons each three-eighths thereof, subject to the life estate of the widow; that the phrase "after the death of my wife" relates to the beginning of the enjoyment of the remainder, and not to the vesting of the estate, and that the provision in reference to the death of the children has reference to the death of a child during the lifetime of testator.

Burke v. Barrett, 635.



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